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IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9582.

GERHART EISLER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the District Court of the United States for the District of Columbia

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JOINT APPENDIX.

A Filed Jun 27 1947

District Court of the United States for the District of Columbia

Criminal No. 219-47

UNITED STATES OF AMERICA

v.

GERHART EISLER

Notice of Appeal

Gerhart Eisler 48-46 47th St., Woodside, Long Island, N. Y.
(Name and address of appellant)
David Rein 1105 K St., Washington, D. C.
(Name and address of appellant's attorney)
Offense Violation of 2 U. S. C. 192
Date of judgment June 27, 1947
Brief description of judgment or sentence 12 months imprisonment and $100 fine.
Name of prison where now confined, if not on bail

I, the above-named appellant, hereby appeal to the Court of Appeals of the District of Columbia from the judgment above-mentioned on the grounds set forth below.

GERHART EISLER
Appellant.

DAVID REIN
Attorney for Appellant.

Date June 27, 1947

B United States Court of Appeals for the District of Columbia Filed June 27 1947

Form of Clerk's Statement of Docket Entries to be Forwarded Under Rule IV

* * * * * * * * * *

1. Indictment for Vio. Sec. 192, Title 2, U. S. Code filed February 27, 1947

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2. Arraignment April 22, 1947
3. Plea to indictment Arraigned, Plea Not Guilty, April 22, 1947
4. Motion to withdraw plea of guilty denied , 19
5. Trial by jury June 4, 1947
6. Verdict or finding of guilt Verdict Guilty as indicted. June 10, 1947
7. Judgment—(with terms of sentence) One Year and One Thousand Dollars fine entered June 27, 1947
8. Notice of appeal filed June 27, 1947

Date June 27, 1947

Attest CHARLES E. STEWART
Clerk.

By: MARGARET L. BOSWELL
Deputy Clerk

* * * * * * * * * *

Excerpts from Testimony and Proceedings

2 PROCEEDINGS

The Deputy Clerk: Case No. 219-47, United States vs. Gerhart Eisler.

* * * * * * * * * *

The Court: I am going to announce my ruling on the affidavit of prejudice that has been filed. In view of the fact that the jury panel is in the courtroom, I thought it only fair to the defendant, in order that no juror might be prejudiced against him as a result of this matter, that I
3 should announce my ruling from the bench outside of the hearing of the jury panel.

I am filing a memorandum striking the affidavit of prejudice. I shall read it to counsel, and I shall file the original memorandum.

"On May 29, 1947, the defendant filed an affidavit of prejudice. The disposition of such an affidavit necessarily involves a delicate task for the judge to whom it relates.

Nevertheless, in the interests of orderly administration of justice, it is the judge's duty, unpleasant though it may be, to strike such an affidavit and proceed with the case if it fails to comply with the requirements of law (U. S. Code, title 28, sec. 25).

"The court has reached the conclusion that in this case the statute has not been complied with and that the affidavit should be stricken for the following reasons:

"First, the affidavit is filed too late. Motions to dismiss the indictment were argued on the merits before me on Friday, May 23, and disposed of on that day. Several days previously to that, David Rein, attorney of record for the defendant, called on me in chambers in company with Assistant United States Attorney Hitz, and requested a continuance of the motion and of the trial, which was set for Monday, May 26. After hearing the application, I denied the continuance, except to the extent of continuing
4 the trial until May 27. On the afternoon of May 23, after the motions to dismiss were argued and disposed of, Mr. Rein accompanied by Mr. Isserman, who stated that he would be trial counsel for the defendant, and Mr. Hitz called on me in chambers, and Mr. Rein and Mr. Isserman requested a continuance of the case because Mr. Isserman had just received word that his brother had died. After some discussion, I continued the case until Wednesday, June 4, for which it is now set. At none of the conferences or appearances before me, either in court or in chambers, was there any suggestion made that I should recuse myself or that I was disqualified. The affidavit of prejudice, as stated above, was filed on May 29, some days after the motions to dismiss were heard and disposed of on the merits and after a continuance had been granted. Under these circumstances, the motion is not made in due time, and, in the opinion of the court, is not made in good faith but for dilatory purposes.

"Second, the affidavit is insufficient on its face. It is well settled that an affidavit of prejudice must state facts show-

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ing a personal prejudice on the part of the judge as against the party individually, or a personal bias or prejudice regarding the justiciable matter pending before the judge, *Berger* v. *United States*, 255 U. S. 22, 23; *Hurd* v. *Letts*, 80 App. D. C. 233; *Price* v. *Johnston* (C. C. A. 9th) 125 F. (2d) 806; *Johnson* v. *United States*, 35 F. (2d) 355. In this case there is no such showing. The affidavit alleges facts
5 showing that the judge is a personal friend of the Director of the Federal law enforcement agency which has had occasion to investigate the defendant, and that the head of that agency has referred to Communists in uncomplimentary terms. The defendant states in his affidavit that he considers himself a member of the German Communist movement. It is further stated that the judge was legal adviser to the law enforcement agency prior to his appointment to the bench. These allegations fall far from meeting the test required by the authorities which have construed U. S. Code, Title 28, Section 25. It might be said in passing that if friendship with the head of a law enforcement agency is a ground for disqualifying a judge, then any judge of this court who happens to be a friend of the Superintendent of Police could never sit in a criminal case. Such a conclusion would be manifestly absurd. Moreover, the allegations relating to Communism are not germane to this case, since Communism is not an issue. The indictment involves a charge of willful default in failing to comply with a subpoena issued by a Congressional committee. In fact, if opposition to Communism were a ground for disqualifying a judge, I dare say it would be a baffling problem to find a Federal Judge who is qualified to sit.

"Third, the certificate attached to the affidavit is not signed by counsel of record in this case, as required by statute. Counsel of record in this case is David Rein
6 of Washington, D. C., who is a member of the bar of this court. The certificate is executed by Carol King, who, it is understood, is a member of the bar of the State of New York, and who is associated with Mr. Rein in

this case. It is important that the certificate be made by counsel who bears a direct responsibility to this court.

"For the foregoing reasons the affidavit is stricken and the trial will proceed as set.

"Having thus disposed of the affidavit, I think it would be appropriate for me to state that I have no recollection of ever hearing of the defendant in this case until I saw his name in the newspapers several months ago."

* * * * * * * * * *

17 The Court: I will tell you what I shall do. I am going to deny the questions which I have marked—

* * * * * * * * * *

and I shall ask the reporter to insert them in the record, so that the fact will appear that these questions have
18 been propounded by defense counsel, have been submitted to the Court, and the Court has declined to propound them to the prospective jurors.

(The questions just referred to by the Court are as follows:)

To what organizations do you belong? Community, Fraternal, Patriotic, Veteran?

Has such organization in the last two years passed any resolution dealing with aliens? Communists?

If so do you support such resolution?

Do you think aliens are entitled to the protection of the Bill of Rights?

Do you think Communists are entitled to the protection of the Bill of Rights?

Do you think alien-Communists are entitled to the protection of the Bill of Rights.

Do you think aliens are entitled to the same protection against unlawful police action as citizens?

Do you think Communists are entitled to the same protection against unlawful police action as anyone else?

Do you think alien-Communists are entitled to the same protection against unlawful police action as anyone else?

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Do you feel that your position with the Government, or that of any of your relatives, would be endangered if you voted to acquit Gerhart Eisler?

* * * * * * * * * * *

32 The Court: Counsel for the respective parties have asked me to propound certain additional questions to you.

Has any juror, or any member of the family of any juror, or any close friend of any juror, ever been a member of any one of the following organizations? And if any one of you answers a question in the affirmative, please rise.

The Communist Party?

(There was no response.)

The Court: The Young Communists League?

(There was no response.)

The Court: The American Youth for Democracy?

33 (There was no response.)

The Court: Civil Rights Congress?

(There was no response.)

The Court: Washington Bookshop?

(There was no response.)

The Court: Joint Anti-Fascist Refugee Committee?

(There was no response.)

The Court: National Council of American-Soviet Friendship?

(There was no response.)

The Court: American Russian Institute?

(There was no response.)

The Court: American Committee for the Protection of the Foreign-born?

(There was no response.)

The Court: Free Germany Movement?

(There was no response.)

The Court: Has any one of you discussed this case or any matter involving the defendant, Eisler, with anyone?

(There was no response.)

The Court: Has anyone read the article that appeared in this morning's Times-Herald or in this morning's Washington Post concerning this case?

. . . . . .

35 The Court: Mr. Isserman, in view of the fact that the jurors, except those who have otherwise answered, have stated, as they have indicated, that they have not heard anything at all about this defendant, it seems to me to be inadvisable for me to ask the specific questions that are on your list.

. . . . . .

Mr. Isserman: May we approach the bench on that question?

The Court: Yes, you may do so.

(Counsel for both sides approached the bench, and the following occurred:)

36 The Court: If you press the question, I shall ask it: "If you have read anything about Eisler, have you read anything charging him with being a foreign agent, an atomic spy, the master mind of the Communists?"

Mr. Isserman: I think we will withdraw that.

The Court: I am suggesting that for the defendant's protection.

Mr. Isserman: Your Honor's point is well taken.

. . . . . .

37 (Counsel returned to the trial table, and the following occurred:)

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The Court: Have any of you read anything about this case in the publication known as the Daily Worker or the publication known as the New Masses?

(There was no response.)

38 The Court: How many of you are employed by the Government? Will those of you who are please rise.

(A number of jurors rose.)

* * * * * * * * * * *

42 The Court: Now, I am asked by defense counsel to ask you these questions:

Does any one of you have any prejudice against aliens?

(There was no response.)

The Court: Does any one of you have any prejudice against Communists?

(There was no response.)

The Court: If it develops in this trial that the defendant is both an alien and a Communist, would that facts
43 prejudice you against him in any way and prevent you from deciding the issues of this case solely on the evidence?

(There was no response.)

The Court: I am further asked by defense counsel to inquire whether any of you belong to any of the following organizations:

First, the American Legion.

The Deputy Clerk: Oren A. Prather, juror No. 22, Criminal Court No. 3.

Walter Smith, juror No. 24, Criminal Court No. 3.

George W. Thomas, juror No. 27, Criminal Court No. 3.

Frank Dean, juror No. 6, Criminal Court No. 3.

Jerry R. Cassell, juror No. 11, Criminal Court No. 1.

Raymond L. Bland, juror No. 2, Criminal Court No. 1.

Dudley C. Bosworth, juror No. 5, Criminal Court No. 1.

The Court: I am also requested by counsel for the defendant to ask whether any of you have ever been members of the Ku Klux Klan.

(There was no response.)

The Court: Or of an organization known as Columbians, Incorporated.

(There was no response.)

The Court: Or of the Steuben Society.

(There was no response.)

The Court: I am also requested by defense counsel
44 to ask you whether any of you are members of the Knights of Columbus. Will you please rise?

(There was no response.)

The Court: I am also asked by defense counsel to ask you whether any of you belong or have belonged to any organization which engages in anti-alien activities or propaganda.

(There was no response.)

The Court: Does any one of you read a publication known as Cross and Flag?

(There was no response.)

* * * * * * * * * *

47 The Court: Counsel for the defendant has asked
48 me to propound certain additional questions to some of the jurors, and I am doing so at the request of defense counsel.

Juror number 6, I am requested to ask you whether you support the program of the American Legion with reference to the exclusion and deportation of aliens. Just answer yes or no.

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Juror No. 6, Frank Dean: Yes.

The Court: You do.

. . . . . .

49 The Court: Now, I am asked to repeat again the question as to whether or not any of you are prejudiced against aliens; whether any of you are prejudiced against Communists; whether, if it should appear that the defendant is an alien and a Communist whether
50 that would prevent and preclude you from deciding this case solely on the evidence?

I assume that your silence is a negative answer to my question.

Mr. Isserman: If the Court please, as to those questions which were not asked will they be incorporated into the record in the same manner as the others?

The Court: If you wish them to be incorporated I will turn them over to the reporter and they will be incorporated.

(Thereupon the questions referred to by counsel are as follows:

"1. Did he believe any portion of the article he read?"

"4. What did he believe in the series of articles he read about February 6 hearing before Un-American Committee?"

"5. What opinion did he form on the basis of what he read?"

. . . . . .

51 Mr. Isserman: Now, at this time we believe one juror who should be challenged for cause is juror number 6, who has stated he supports the policies of the American Legion relative to the exclusion and deportation of aliens. We believe, in view of the fact that the defendant in this case is an alien, that is bound to be important in this case because of his support of those principles.

The Court: Does the Government wish to be heard?

Mr. Hitz: I do not think it is sufficient cause for excusing him for cause.

The Court: I don't either and I will not excuse him except by consent. I do not think it is ground for challenge. Challenge overruled.

* * * * * * * * * * *

(Counsel returned to the trial table, and the following occurred:)

Mr. Isserman: Your Honor, at this point we would
52 like to challenge number 6.

The Deputy Clerk: Juror number 6, Frank Dean, you are excused. Have a seat in the panel, please.

(Frank Dean was excused and left the jury box.)

* * * * * * * * * * *

Mr. Isserman: At this time, if the Court please, we would like to ask that juror number 8 be excused in our behalf.

The Deputy Clerk: Juror number 8, David D. Druskin, you are excused, and resume your seat in the panel.

(David D. Druskin was excused and left the jury box.)

* * * * * * * * * * *

53 Mr. Isserman: If the Court please, we ask that juror number 12 be excused in our behalf.

The Deputy Clerk: Juror number 12, Cecil Gordon.

Juror Gordon: Yes, sir.

The Deputy Clerk: You are excused. Have a seat in the panel.

(Cecil A. Gordon was excused and left the jury box.)

* * * * * * * * * * *

60 **John Parnell Thomas**

* * * * * * * * * * *

Direct Examination

By Mr. Hitz:

Q. Mr. Thomas, will you give your full name? A. John Parnell Thomas.

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Q. Are you a member of the House of Representatives from New Jersey? A. I am.

Q. Were you designated the Chairman of the so-called House Un-American Activities Committee by resolution of the House of Representatives of the Eightieth Congress? A. I was.

Q. Was that in January of 1947? A. It was.

Q. Approximately January 3? A. That is correct.

Q. Is that a bipartisan standing Committee, Mr. Thomas? A. It is.

Q. Did you commence to function as a Committee pursuant to that resolution, Mr. Thomas? A. I did.

61 Q. And were you functioning as its Chairman, and was the entire Committee functioning under the resolution in February, 1947? A. It was.

Q. And particularly at the 23rd of January, 1947, was that Committee functioning pursuant to that resolution? A. It was.

Q. And you on that date as its Chairman? A. I was.

Q. Did you cause a subpoena to be issued on the 23rd of January, 1947, for a certain person? A. I did.

Q. Who was that person? A. Gerhart Eisler.

Q. Now, on the 4th, and the 6th, particularly of February, were you again functioning pursuant to the resolution as a Committee? A. We were.

Q. On the 6th of February, 1947, did Mr. Eisler appear? A. He did.

Q. Did he appear in answer to subpoena, Mr. Thomas? A. He did.

Q. At that time was he in custody of any authorities? A. He was.

Q. Mr. Thomas, is your Committee empowered to

62 administer oaths to witnesses? A. We are.

Q. And have you done that in the conduct of Committee business since you have been Chairman? A. We have.

Q. Have you done that invariably or have there been exceptions to the rule at some time? A. I do not recall any exception.

Q. Now, on February 6, 1947, was a request made of Mr. Eisler to be sworn and testify? A. There was.

Q. Who made that request of him? A. I do not quite understand the question.

Q. Who made the request of Mr. Eisler to be sworn to testify? A. First Mr. Stripling.

Q. Do you recall what Mr. Eisler's reply was? A. Mr. Eisler replied that he would not testify.

Q. At that time did Mr. Eisler have counsel, Mr. Thomas? A. He did.

Q. And who was the counsel? A. Carol King.

Q. Mrs. Carol King? A. That is correct.

63 Q. Who appears for him here today? Do you see her today, by the way, Mr. Thomas? A. Yes, I do.

Q. Was she present in the Committee hearing room on the morning of February 6? A. She was.

Q. Did there come a time that morning when Mr. Eisler was again requested to take the oath? A. That is correct.

Q. Would you tell us what request was made of him and what he said? A. I made the request that he stand and raise his right hand.

Q. To which what did he say? A. "No."

Q. Was a further request made of him, Mr. Thomas? A. I do not recall.

Q. Did he make any statement with regard to what he wanted to do? Just answer "yes" if he did, or "no" if he didn't, and then we will go into it. A. No, I would like to explain it.

Q. Yes, please do. A. He was about to say that in connection with—

Mr. Isserman (interposing): I object, if the Court please; I do not know how this witness can know

64 what anyone was about to say. It is speculation on the part of the witness.

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The Court: I do not know until the witness finishes his answer.

Mr. Isserman: Whatever his answer is, Your Honor, it cannot be factual.

The Court: You may proceed, and you may note your objection.

The Witness: I was about to say, based on a subsequent act, that he would not testify, that he would not be sworn until he was able to make a statement.

By Mr. Hitz:

Q. Did he finally say that, what you have just said? A. No.

Q. Did he testify, Mr. Thomas? A. No.

Q. Did he make any request of the Committee? A. No.

Q. Did he have anything in his hand, Mr. Thomas? A. No.

Q. Did he make any request to make a statement of any sort? A. No.

Q. Would you tell us what it was that he did say
65 to the Committee? A. Well, to me he was very arrogant.

Mr. Isserman: I object, if the Court please, and ask that it be stricken out, and that the witness be admonished not to make such comment.

The Court: I suggest that you direct your answer to the question.

The Witness: What was the question?

By Mr. Hitz:

Q. What did Mr. Eisler say? A. I do not recall anything other than "no."

Q. And do you recall whether he said anything about making a three-minute statement?

Mr. Isserman: I object to that on the ground that the witness has already answered and that he has exhausted his recollection.

The Court: Objection overruled.

By Mr. Hitz:

Q. Did Mr. Eisler say anything with reference to making a three-minute statement to the Committee? A. I do not recall that.

Q. Do you recall anything that was said by you to Mr. Eisler concerning a statement that he might be permitted to make? A. Yes, sir, I made a short statement to Mr. Eisler, a copy of which I have in the official document with me.

66 Q. I am afraid you did not understand my question, or perhaps I did not make it clear.

Did you tell Mr. Eisler anything with respect to whether or not he would be permitted to make a statement? A. To the best of my recollection I told him that he could make a statement after he was sworn.

Q. And do you recall what he replied, if anything, to that? A. No, but it was right along the same line, "No."

Mr. Isserman: I ask that the second half of that answer be stricken. The witness has answered that he did not recollect anything else, and then made some further remark.

The Court: Motion denied.

By Mr. Hitz:

Q. In any event, did he raise his hand to be sworn? A. Never.

Q. Did he testify under oath? A. No.

Q. On that date was a quorum present, Mr. Thomas? A. There was.

* * * * * * * * * *

Cross Examination

By Mr. Isserman:

67 Q. Mr. Thomas, was there a stenographic record taken of the session at which Mr. Eisler appeared on February 4, 1947? A. There was a stenographic record kept of his appearance on February 6, 1947.

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Q. I stand corrected. That is the date I had in mind. Who was the stenographer who took the minutes of that session? A. The regular House reporter that we use each time.

Q. Do you know his name? A. No, I don't.

Q. Can you ascertain his name, Mr. Thomas? A. I can get his name, yes.

Q. Now, on the morning of February 6 was Mr. Eisler in the hearing room when you called the opening of the Committee session? A. He was.

Q. Was he by himself? A. To the best of my recollection he was not by himself.

Q. Do you know with whom he was in the hearing room? A. To the best of my recollection he was with his counsel, Carol King.

Q. And would you say he was with any other persons that morning except his counsel, Carol King? A. I did not notice.

68 Q. Did you notice in the hearing room while Mr. Eisler was present, one R. J. Brosman?

Withdraw that question.

Did you notice in the hearing room while Mr. Eisler was present one R. J. Brosman, security officer of the Department of Justice? A. I recall seeing two United States marshals. The room was jammed packed with people.

Q. You don't know the names of these two United States marshals?

The Court: I wonder if that could not be stipulated, because it was mentioned by Mr. Hitz in his opening.

Mr. Isserman: If the Court please, this also goes to the credibility of the witness, from the standpoint of what he recollects.

The Court: Very well I was only suggesting that it might be stipulated. However, you may proceed, if you prefer.

Mr. Isserman: We prefer that.

By Mr. Isserman:

Q. Now, you did notice two United States marshals in the room, did you not? A. That is correct.

Q. Do you know whether or not, or do you recollect whether or not Mr. Stripling asked any questions of these two marshals before Mr. Eisler was taken out? A. No.

69

Q. You don't recall that? A. I recall Mr. Stripling saying something but I would not know what it was.

Q. Do you recall asking any question officially at that hearing as to how Mr. Eisler came to the hearing room? A. I couldn't say one way or the other.

Q. Did you see Mr. Eisler leave the hearing room? A. I did.

Q. Did he leave accompanied only by Mrs. Carol King? A. No, he left accompanied by the two United States marshals.

Q. One on each side of him when he left? A. I couldn't say whether there was one on each side of him.

Q. But you knew he was leaving in the custody of two United States marshals, did you not? A. I did.

Q. Did you know also, Mr. Thomas, that Mr. Eisler was brought to the hearing room in the custody of the two United States marshals you have described? A. I will assume that.

Q. Don't you know that to be a fact? A. I would assume so, yes.

Q. Did Mr. Eisler at any time in the course of the hearing say that he came there voluntarily in response of a subpoena? A. I do not recall Mr. Eisler saying very much of anything except "No."

70

Q. And you do not recall Mr. Eisler saying anything about whether he came there voluntarily in response to a subpoena? A. I do not recall.

Q. On the morning of February 6th, before the hearing, didn't you take steps to insure Mr. Eisler's appearance? A. On that particular morning?

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Q. Yes. A. I took no steps.

* * * * * * * * * *

71 Q. Mr. Thomas, do you recall at the opening of the hearing that you directed Mr. Stripling to call the first witness that morning? A. That is correct, sir.

Q. I am referring to the hearing on February 6. A. Yes, sir.

Q. And do you recall Mr. Stripling saying, "Mr. Gerhart Eisler, take the stand"? A. That is correct.

Q. Do you recall Mr. Eisler saying, "I am not going to take the stand until I have made a few remarks"? A. I remember Mr. Eisler saying, "I am not going to take the stand."

Q. And do you recall him saying, "I am not going to take the stand until I make a few remarks? A. No.

72 Q. Do you recall Mr. Stripling asking Mr. Eisler if he had counsel with him? A. That is correct.

Q. Do you recall what Mr. Eisler's answer was? A. Yes, I do.

Q. Now, Mr. Eisler—I mean Mr. Thomas—did you take any action in respect to admitting counsel for Mr. Eisler? A. Yes, I did.

Q. And what was done on that occasion? A. I told Mr. Eisler he could have counsel.

Q. And then did you ask Mr. Eisler to take the oath? A. I did.

Q. And then did Mr. Eisler indicate that he desired to make a few remarks before he was sworn? A. No, sir.

Q. Isn't it a fact that Mr. Eisler said on a number of occasions, "You will not swear me in before you hear a few remarks?" A. He stated, "You will not swear me in," but I do not think the record shows "a few remarks."

Q. I am now asking you to give us your recollection, not what the record shows. A. It is my recollection he did not say what you said.

Q. Do you remember Mr. Eisler saying "I am ready to answer all questions, to tell my side," in answer to

73 a direct question from you, "You refuse to be sworn in? Do you refuse to be sworn in, Mr. Eisler?"

Don't you recall Mr. Eisler saying that? A. I have the record here, the same record you have, if His Honor will let me recall exactly.

The Court: Yes, you may refer to anything that will refresh your recollection.

By Mr. Isserman:

Q. Mr. Thomas, have you in front of you now a printed document entitled "Investigation of Un-American Propaganda Activities in the United States"?

* * * * * * * * * *

Q. The document is further entitled, "Transcript of Proceedings, Committee on Un-American Activities, House of Representatives, Eightieth Congress, First Session," and bears date "February 6, 1947," and the legend, "Printed for the use of the Committee on Un-American Activities," and ask you if that is the printed document which you have before you? A. Except that there is some additional matter on the face of my document.

74 Q. Yes, but everything I read to you is on that document, is it not? A. Yes, sir, that is true.

Q. I was simply saving time not to read the rest. A. That is right.

Q. Now, that was printed for the use of your Committee, was it not? A. Yes, that is right, and printed for the use of Congress.

Q. And is the document which the Committee uses officially? A. That is correct.

Q. Now, I ask you to turn to page 2 of that document and call your attention to the third line from the bottom in which the following appears:

"The Chairman." That is referring to yourself, is it not, Mr. Thomas? A. That is correct.

Q. "You refuse to be sworn in? Do you refuse to be sworn in, Mr. Eisler?"

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And then Mr. Eisler replies: "I am ready to answer all questions, to tell my side."

Isn't that what Mr. Eisler answered in response to that question you put, Mr. Thomas? A. That is correct, but—

Q. (Interposing) Now, just a minute—

The Court: Let the witness finish.

Mr. Isserman: Just a minute, if the Court please—

The Court: Let the witness complete his answer.

The Witness: But for one whole page previous to that he had not only refused, but also said nothing about making a statement.

Mr. Isserman: If the Court please, I ask that that be stricken on the ground that it is a conclusion by this witness as to what had happened previously.

The Court: Objection overruled.

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Louis J. Russell

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Direct Examination

By Mr. Hitz:

Q. Give your full name, Mr. Russell. A. Louis J. Russell.

Q. What is your occupation? A. I am investigator for the Un-American Activities Committee.

Q. Were you employed in that way in January and February, 1947? A. I was.

Q. Under the direction of the Chairman, Mr. Thomas? A. I was.

Q. I show you Government Exhibit 5 for Identification. Can you identify it? Answer yes or no. A. Yes.

Q. What is it? A. It is the subpoena calling for the appearance of one Gerhart Eisler, 48-46 47th Street, Borough of Queens, New York.

Mr. Hitz: I think you have answered the question.

Your Honor, I offer this subpoena in evidence.

Mr. Isserman: May we examine it, please?

(Mr. Hitz handed a paper to Mr. Isserman.)

Mr. Isserman: No objection.

The Court: It may be admitted.

(Subpoena, Government Exhibit 5 for identification, was received in evidence.)

By Mr. Hitz:

Q. Mr. Russell, are you familiar with the signature
82 of Mr. Thomas, the Chairman? A. I am.

Q. Does it appear on Government Exhibit 5? A. Yes, that is the signature of J. Parnell Thomas, Chairman of the Committee on Un-American Activities.

Q. When did you receive that subpoena to Mr. Eisler?

The Court: May I see this?

(Mr. Hitz handed a paper to the Court.)

The Court: You may proceed.

By Mr. Hitz:

Q. When did you receive that subpoena, Mr. Russell? A. On January 23, 1947.

Q. From whom? A. From the office of Mr. Thomas.

Q. At the same time did you also receive a pink copy of the same document? A. I did.

Q. Did you receive instructions from Mr. Thomas as to what to do with the pink copy and also with the copy which is Government Exhibit 5? A. I did.

Q. What did you do as the result of your instructions? A. Well, I went to New York on January 23, and I conducted some other investigation, and on the morning of January 24, 1947, at about 8:30, I served Gerhart
83 Eisler with the original of the subpoena and left with him a pink copy of the original.

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Q. Where did you serve Mr. Eisler? A. At his residence, 48-46 47th Street, Borough of Queens, New York City, New York.

Q. Have you any personal knowledge as to whether or not at that time he was in custody of any officials? A. No, he was not.

Q. Did you make a return on Government Exhibit 5 of the service that you made of the pink copy? A. Yes, I did.

The Court: I suggest that the witness identify the person whom he served.

By Mr. Hitz:

Q. Do you see that person in Court here? A. Yes, I do.

Q. Where is he? A. He is sitting by, I believe, Mr. Isserman. I believe that is the name.

Mr. Isserman: Indicating Mr. Eisler.

Mr. Hitz: May I read the subpoena at this time, Your Honor?

The Court: Yes, indeed.

Mr. Hitz: (Reading) "Original. By authority of the House of Representatives of the Congress of the
84 United States of America.

"To the Sergeant at Arms, or his Special Messenger:

"You are hereby commanded to summons Gerhard Eisler, 48-46 47th Street, Borough of Queens, New York, New York, to be and appear before the Un-American Activities Committee of the House of Representatives of the United States, of which the Hon. J. Parnell Thomas is Chairman, in their chamber in the City of Washington, on February 6, 1947, in room 226, old House Office Building, at the hour of 10:00 a.m., then and there to testify touching matters of inquiry committed to said Committee; and he is not to depart without leave of said Committee.

"Herein fail not, and make return of this summons.

"Witness my hand and the seal of the House of Representatives of the United States, at the City of Washington,

this 23rd day of January, 1947"; with some script below that, stating: "J. Parnell Thomas"; and underneath that, in typewriting, "Chairman."

In the left-hand corner there appears this: "Attest: John Andrews, Clerk."

By Mr. Hitz:

Q. Is he Clerk of the House of Representatives? A. Yes, he is.

Mr. Hitz: On the back there are ink notations which I think it fair to summarize is the return Mr. Russell
85 has stated he made on this particular copy of the service of the pink copy in New York.

By Mr. Hitz:

Q. Is that correct, Mr. Russell? A. That is true.

Q. Mr. Russell, did you actually leave the pink copy of the document I have read, which is Government Exhibit 5, with Mr. Eisler in New York? A. Yes.

Q. Did you again see the pink copy? A. No, I never saw the pink copy after that until I saw it in the file.

Q. You have served other subpoenas, have you, Mr. Russell? A. Yes, sir, I have.

Q. Is it the practice that the pink copy is kept by the person who is served? A. That is true.

Mr. Hitz: No further questions, Your Honor.

The Court: You may cross examine.

Cross Examination

By Mr. Isserman:

Q. Mr. Russell, before you served Mr. Eisler, you called him up, did you not? A. That is true.

86 Q. You told him who you were? A. That is right.

Q. He agreed to have you meet him at 8:30 the next morning at his house, where he would accept service? A. No. I called him that morning and asked him if he would be in. I told him that I wanted to serve him with a subpoena.

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Q. What did he say when you told him that? A. He said that he would be there. He would wait for me.

Q. You are not connected with—you do not work in—the office of the Sergeant at Arms of the House of Representatives, do you? A. No.

Q. Nor are you designated in any way as his special messenger, are you? A. Well, according to the literal interpretation of the subpoenas issued by the House, I am.

Q. In other words, you feel you got the designation as special messenger when Mr. Thomas handed you the subpoena? A. That is true. If I can qualify it a little bit, I have worked for one other committee, and we used the same procedure in serving subpoenas. I believe all the committees of the House follow the same practice.

Q. Yes, but you received no authority from the
87 Sergeant at Arms to serve this particular subpoena on Gerhart Eisler, did you? A. No, I never had any discussion with the Sergeant at Arms.

Mr. Isserman: That is all.

Redirect Examination

By Mr. Hitz:

Q. But you were designated by the Chairman, Mr. Thomas? A. That is true.

Mr. Hitz: That is all.

(The witness left the stand.)

Mr. Hitz: Mr. Stripling.

Mr. Isserman: I might note that this witness is under subpoena. I hope he understands he is not excused.

The Court: Yes; the practice in this Court is for witnesses to remain in attendance unless they are affirmatively excused.

Mr. Russell: All right.

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Robert E. Stripling

. . . . . .

Direct Examination

By Mr. Hitz:

Q. Mr. Stripling, give your full name, please.
88 A. Robert E. Stripling.

Q. S-t-r-i-p-l-i-n-g, is it? A. That is right, sir.

Q. What is your occupation, Mr. Stripling? A. I am chief investigator of the Committee on Un-American Activities, U. S. House of Representatives.

Q. Were you that in January and February of this year, 1947? A. Yes, sir.

Q. Were you present on February 6, 1947, at the hearing held on that day pursuant to the resolution creating that committee—the Un-American Activities Committee—in this city? A. Yes, sir.

Q. Did you see at that time the man on trial, Mr. Eisler, at the Committee hearing? A. I did, sir.

Q. Will you tell us what took place at the hearing, Mr. Stripling? A. The Committee convened at 10 a.m. I was asked by the Chair if all witnesses were present.

I explained to the Committee that two of the witnesses that had been subpoenaed, Mr. Leon Josephson and Mr. Samuel Liptzen, had not appeared.

The Committee then had a discussion as to what
89 action would be taken relative to their not appearing.

Q. At this point was Mr. Eisler in the room?

By the Court:

Q. Confine yourself to matters relating to this defendant. A. Mr. Eisler was in the room, yes, sir.

By Mr. Hitz:

Q. Was he represented by counsel at that time? A. He had not been called to the witness stand at that time.

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Q. Was Mrs. Carol King present in the room at the time? A. She was, yes.

Q. What took place with reference to Mr. Eisler? A. The Chairman asked me to call the first witness. I called out the name of Gerhart Eisler and asked Mr. Eisler to take the stand.

Mr. Eisler came forward with papers in his hand, and he said, "I am not going to take the stand."

I stepped down from the—stepped away from the counsel's table and walked over to the witness stand with Mr. Eisler.

I said to him, "Do you have counsel with you?" and he said, "Yes."

I said to the Chairman, "I suggest that the witness be permitted counsel."

At the same time I obtained a chair to pull up to
90 the table, in order that counsel to be seated.

The Chairman then asked Mr. Eisler to be sworn—to raise his right hand and to be sworn.

Mr. Eisler said, "No," and he would not raise his hand.

I then interrupted the Chairman—sought to interrupt him—and Mr. Eisler said, "I have the floor now."

I persisted, and the Chair recognized me, and I suggested to him that he make his preliminary remarks at that time to the Committee, which is the customary thing for the Chairman to do in opening the hearing.

Q. Did Mr. Eisler make some reply to the remarks addressed to him? A. The only thing that I remember is that he said, "I have the floor now."

After the Chairman had completed his remarks, he then asked Mr. Eisler to raise his right hand and to be sworn.

Mr. Eisler said, "No."

Q. Did Mr. Eisler say anything more about it? A. Well, yes, there was—during the next five minutes, I would say that the Chairman asked Mr. Eisler some six or seven times to be sworn. Mr. Eisler refused to be sworn. He stated that he wanted three minutes in which to read a statement or to make a statement.

Q. Finish your answer. A. Or to make a statement.

91 Q. Was this the first time he said he wanted to make a statement? A. He made the request to make a statement—

Mr. Isserman: I object to the question.

The Court: Objection overruled.

Mr. Isserman: I should like to state my ground.

The Court: What is the ground?

Mr. Isserman: My ground is that he says, "Was this the first time?" and there is no fixing of time.

The Court: Objection overruled.

The Witness: He had been asked twice by the Chairman to raise his right hand and to be sworn before he mentioned the statement, as I recall.

By Mr. Hitz:

Q. What did he say about making a statement? A. He said that he wanted to make a statement. He wanted three minutes to make a statement.

The Chair explained to him that the Committee did not permit witnesses to make statements prior to being sworn, and the Chairman said he would have to be sworn first.

Mr. Eisler, according to my best recollection, said—made the statement: then there would be no hearing with him if he was not permitted to make his statement.

92 Q. Have you told us all you can recall that took place between the Chairman and the witness? A. Well, Mr. Eisler having refused to take the oath, the Chairman dismissed him, so to speak, and Mr. Eisler and his counsel stepped aside, at which juncture his counsel began to distribute the statement to the press.

Q. Have you told us all you can recall that Mr. Eisler said to the Chairman? A. Yes. He said more later, but he did not say it from the witness stand.

Q. I mean up to this point? A. Yes, I have told you all.

Q. Did the Chairman say anything to Mr. Eisler about being permitted to make a statement after he had been

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sworn and after he had answered the Committee's questions? A. Yes; he told Mr. Eisler that if he would—after he took the oath, the Committee would permit him to make a three-minute statement. He finally agreed to that.

Q. To that, what did Mr. Eisler say? A. As I recall, Mr. Eisler told the Chairman that he would not take the oath; that he did not have to do anything; that he was a political prisoner.

"I don't have to do nothing," I believe is what he actually said.

Q. Did Mr. Eisler ever take the oath? A. No, sir.

93 Q. Did he ever take the witness stand? A. He was at the witness table.

Q. Did he ever take the witness chair? A. I believe he sat down while the Chairman read the preliminary statement.

Q. Did he sit in the witness chair or not? A. Yes.

Q. In any event, he was never sworn? A. That is right, sir.

Q. And he was never asked any questions under oath; is that correct? A. That is right, sir.

Q. Then he left the room, after distributing the papers he had to the press?

Mr. Isserman: I object to that question. There is no evidence—

The Court: Will you read the question, please?

(The last question was read by the court reporter.)

The Court: The witness stated that counsel distributed the statement to the press, as I understood him.

By Mr. Hitz:

Q. Who distributed those papers, Mr. Stripling. A. The counsel.

Q. You were about to relate a while ago that Mr. Eisler then said something more; is that correct? A. Mr. Eisler and his counsel withdrew from the witness

94 stand, and the Chairman says, "Bring your next witness."

Then, Congressman Mundt, a member of the Committee, stated that he thought the Chairman should ask the witness again if he refused to be sworn, and he was asked again by the Chairman. He was asked again by the Chairman and refused to take the oath again.

Q. Where was the witness chair with respect to the Chairman? A. It was in the center of the room, directly opposite the Chairman, just as I am facing you. I would be the Chairman, and you would be in the position of the witness.

Q. Where were the other members seated? A. They were seated straight across, behind the Committee table.

Q. Where was the Chairman with reference to his members? A. He was seated in the middle. On his right were the Republican members, and on his left were the Democratic members of the Committee.

Q. By "opposite," do you mean in front of him was the witness chair? A. That is right, sir.

Q. Counsel table was where with respect to the witness chair? A. It was on the right of the Chairman and even with the witness.

95 Mr. Hitz: No further questions, Your Honor.

Cross Examination

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98 Mr. Isserman: I would like to suggest the stipulation, Your Honor, that Mr. Gerhart Eisler was brought to the hearing room on February 6, 1947, in the custody of two security officers of the Department of Justice Immigration and Naturalization Service, and that immediately upon his being dismissed by the Chairman, and after questioning by the Chairman and secretary of the Committee, he departed in the custody of the same two officers.

The Court: What do you say about that?

Mr. Hitz: We stipulate to that.

The Court: Very well; those facts are stipulated. I suggest that we do not consume any time on further interrogations with regard to his custody.

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Mr. Isserman: I believe that will save some time.

By Mr. Isserman:

Q. Just before Mr. Mundt made his motion that the witness be cited for contempt, do you recall the following conversation between the Chairman and Mr. Eisler:

"The Chairman: Then you refuse to be sworn?"

"Mr. Eisler: I do not refuse to be sworn. I want only three minutes. Three minutes to make a statement."

"The Chairman: We will give you those three minutes when you are sworn."

"Mr. Eisler: I want to speak before I am sworn."

99 Do you recall that conversation? A. Yes, I recall that.

Q. Wasn't that the last conversation before the motion to hold Mr. Eisler in contempt was made by Representative Mundt? A. I couldn't be sure about that without examining the record.

Q. But you do remember that conversation? A. Yes, I remember that conversation.

Q. Did you notice what Mr. Eisler had in his hand? You said he had something in his hand, I believe. Wasn't that your direct testimony? A. Yes.

Q. What was it? Wasn't it some yellow sheets of paper like this, indicating legal foolscap? A. I believe Mr. Eisler had a cigarette in one hand, and in the other hand he had what appears to me to be white paper.

Q. You did not see that he had a few sheets of this yellow paper? A. No, I didn't see that.

Q. You did not examine at any time what was on the paper which Mr. Eisler had in his hand? A. I did not.

Q. Now, Mr. Eisler at no time before he left the hearing room distributed anything to any person in the room,

100 did he, as far as you could see? A. No.

Q. The room was rather crowded, wasn't it, Mr. Stripling? A. Yes, it was.

Q. There were a lot of photographers present? A. There were quite a few, yes.

Q. Wouldn't you say there was a good deal of confusion in the early part of the hearing, while Mr. Eisler was there? A. There was no confusion while he was on the witness stand, no, sir.

Q. Photographers were taking photographs in the hearing room? A. They were, yes, sir.

Q. Flash bulbs were going off? A. That is right.

Q. Do you remember Mr. Eisler making this statement: "I have never refused to be sworn in. I came here as a political prisoner. I want to make a few remarks, only three minutes, before I be sworn in, and answer your questions, and make my statement. It is three minutes"?

Do you remember his saying that? A. Yes, I do.

Q. Do you reember Mr. Eisler saying: "I am ready to answer all questions" on at least two occasions, Mr.
101 Stripling? A. You mean before or after he refused to be sworn?

Q. I mean in the course of the hearing. Do you remember Mr. Eisler saying: "I am ready to answer all questions"? A. I think Mr. Eisler made that statement after he had been dismissed by the Chairman.

Q. You mean after the motion for contempt was made, or just before that time? A. I believe the Chairman had asked the Committee what was their pleasure regarding the matter.

Q. Did not Mr. Mundt make a motion to cite Mr. Eisler for contempt before the Chairman said anything about what is the pleasure of the Committee? A. I don't believe so.

Q. You say that the only time Mr. Eisler said, "I am ready to answer all questions," was after he had been dismissed by the Chairman? Is that your best recollection? A. Well, I would like to make it clear that Mr. Eisler left the stand before Mr. Mundt asked the Chairman to ask him again to be sworn. He was not at the witness stand at that moment; he stepped back.

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Q. I am talking now about the period before, you say, Mr. Eisler was dismissed as a witness and am asking you whether in the period before he was dismissed he did not say, "I am ready to answer all questions." A. I don't recall that.

102 The Court: May I make this suggestion? I assume you are reading from the transcript of the hearing?

Mr. Isserman: I am.

The Court: That is available to both sides. It seems to me that perhaps the quickest and the most efficacious way to proceed would be to offer the transcript in evidence instead of examining this witness from the transcript.

Mr. Isserman: Counsel in conference have already believed that in order to save time in the cross examination of Mr. Thomas we would by tomorrow morning prepare a stipulation which we would submit to the Government and ask whether or not the Government would join in the stipulation as to just what particular questions and answers were directed to this witness, and eliminate other matter which is not material.

The Court: My suggestion is slightly different. My suggestion is that the transcript of proceedings before the Committee be offered in evidence. That will eliminate a great deal of the time taken in examination of this witness. Is there any objection to that?

Mr. Isserman: We could not agree to that at this moment. We plan to call the stenographer properly to show that some corrections are required. However, we will prepare a stipulation which might be satisfactory.

The Court: Very well. Proceed.

By Mr. Isserman:

103 Q. Isn't it true that Mr. Eisler sat down in the chair reserved for witnesses at the very beginning of the hearing? A. I don't recall that he did, no.

Q. Well, do you have any recollection as to when Mr. Eisler took the witness stand? A. It is my recollection

that he sat down when the Chairman made his preliminary remarks—while he was reading his preliminary remarks.

Q. So that it was shortly after Mr. Eisler stated, according to your testimony, "I am not going to take the stand," that he actually sat down in the witness chair; isn't that true? A. I don't recall exactly whether he sat down or whether he stood.

The Court: I think that is minutiae and is immaterial, because the charge against the defendant is that he declined to take the oath. What chair he was sitting in or whether he was seated or standing is, I think, immaterial. I suggest to counsel that the interrogation be directed to the charge in the indictment.

Mr. Isserman: Well—

The Court: Do not argue. I made a suggestion. Proceed to the next question.

Mr. Isserman: I would like to have an answer to the question I just put.

104 The Reporter (reading): "Question: So that it was shortly after Mr. Eisler stated, according to your testimony, 'I am not going to take the stand,' that he actually sat down in the witness chair; isn't that true?"

By the Court:

Q. If you don't remember, say you don't remember. A. I don't remember.

By Mr. Isserman:

Q. Do you remember that he sat down in the chair at all, Mr. Stripling? A. I am not positive whether he sat down or not.

Q. Just a few minutes ago you said Mr. Eisler walked over to the table and sat down in a chair reserved for witnesses. Now, did he or did he not do that?

The Court: You have the record; do not repeat the same question.

Mr. Isserman: That is not in the record. This is a matter outside the record.

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The Court: I mean it is already in the record of what this witness testified this afternoon. You are repeating the same question.

Mr. Isserman: It is not clear to counsel. The witness has contradicted himself.

The Court: The question is in the record. Now, proceed to another question.

105 Mr. Isserman: I would like to resolve the contradiction by continuing questioning on this point.

The Court: Ask a specific question with a view to resolving the contradiction, if you wish. You may do that.

By Mr. Isserman:

Q. Isn't it true, Mr. Stripling, that in this hearing this afternoon you have testified that Mr. Eisler took the witness chair? A. I believe in my—early in my testimony I stated that it was my impression—my opinion—that he had taken a seat while the Chairman read the statement.

Q. Isn't that still your recollection of what happened? A. That is my recollection: that while the Chairman read his statement, Mr. Eisler was seated.

106 Q. Wasn't your testimony to the effect that it was only two or three seconds after Mr. Eisler said, "I am not going to take the stand," that he actually sat down in the witness chair? A. No.

Q. How long after Mr. Eisler said, "I am not going to take the stand," did he take the stand? A. Mr. Eisler was called to the witness stand. He said, "I am not going to take the stand." He was standing.

Q. How long after that did he sit down? A. Then the Chairman asked him to raise his right hand and be sworn, and he says, "No."

I then asked the Chairman—I asked the Chairman to recognize me, and Mr. Eisler said, "I have the floor now."

Q. What happened next? A. Then I asked the Chairman to read or to make his preliminary remarks to the committee, which he did. It is my opinion that Mr. Eisler then sat down while he read the preliminary remarks.

Q. Now, the time which it had taken the Chairman to read those remarks, from the time Mr. Eisler said he would not take the stand, was only a few seconds? A. No, it was longer than a few seconds.

Q. How long would you say it was? A. I would say it required a minute to read it.

107 Q. About a minute? A. Yes.

Q. Isn't it true that what Mr. Eisler really said the first time was: "I am not going to take the stand until I have made a few remarks"? Isn't that what he said, Mr. Stripling? A. I am not sure about that.

Q. You would not say he did not say that? A. No; I think the record would show it. I think the record might also show whether he sat down or not.

Q. But from your own recollection, you are not sure? A. No.

Mr. Isserman: I think that is all on cross-examination.

Redirect Examination

By Mr. Hitz:

Q. You were asked by counsel if this was not the last thing that was said by Eisler: "I want to speak before I am sworn"; and in answering that you said that without examining the record you could not say whether that was the last thing said by Eisler. I am showing you page 3, a little bit below the middle of the page, of the official report. I will ask the same question. Was that the last thing said by Mr. Eisler?

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108 A. Yes. That was the last thing he spoke.

Q. That was the last thing Mr. Eisler said: "I want to speak before I am sworn"? A. That is right, sir.

Q. Was it before or after that that a motion was made that he be held in contempt? A. It was after that.

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118 **Hon. John Parnell Thomas**

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Cross Examination (Resumed)

By Mr. Isserman:

Q. Mr. Thomas, you testified at yesterday's session on direct examination that when Mr. Eisler was brought into the hearing room, he was in the custody of the Federal authorities; isn't that correct?

The Court: That was stipulated, Mr. Isserman.

Mr. Isserman: It is a preliminary question to my next question.

The Court: I do not want any time consumed on matters of stipulation.

Mr. Isserman: I am referring now not to the stipulation but to the testimony of this witness.

The Court: Very well. Proceed.

The Witness: What was the question?

The Reporter (reading): "Question: Mr. Thomas, you testified at yesterday's session on direct examination that

119 when Mr. Eisler was brought into the hearing room, he was in the custody of the Federal authorities; isn't that correct?"

The Court: That question is excluded, because that matter has been stipulated. Ask the next question.

By Mr. Isserman:

Q. Mr. Thomas, when you testified yesterday—

Mr. Isserman: I withdraw that.

By Mr. Isserman:

Q. It is true, isn't it, Mr. Thomas, that you testified yesterday that Mr. Eisler appeared before the Committee in answer to a subpoena? A. That is correct.

Q. Didn't you intend by that merely to state that Mr. Eisler was present at the hearing in the custody of two Federal officers? A. Not necessarily.

Q. Well, what indication was there by Mr. Eisler that he had appeared in answer to a subpoena? A. It was to show that he was there in response to a subpoena.

The Court: Just a moment. It was stipulated yesterday that the defendant was brought to the Committee hearing in custody of two officers from the Immigration and Naturalization Service.

Mr. Isserman: That is correct.

The Court: Then, I do not see any reason for consuming time in cross-examination on that point.

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Mr. Isserman: If the Court please, I am cross-examining on another point. I am cross-examining on the statement of this witness that Mr. Eisler was there in response to a subpoena. I asked him on what facts he based that statement.

The Court You may ask him the question.

The Witness: What was your question?

Mr. Isserman: I think I had better withdraw the previous question and repeat it.

The Court: Yes.

By Mr. Isserman:

Q. Mr. Thomas, I call your attention to the fact that you testified yesterday that Mr. Eisler appeared in the hearing room of the Committee on Un-American Activities on February 6, 1947, in response to a subpoena. A. That is correct.

Q. Will you tell us on what facts you based that statement? A. Because, first I signed the subpoena; secondly, I knew that he had received the subpoena; and thirdly, I would naturally draw a conclusion that he was there in reply to the subpoena.

Q. So your conclusion was based upon the fact that you signed a subpoena, and you knew he had been served;

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is that correct? A. I knew I had signed the subpoena, and I knew he had been served.

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Q. And there is another fact upon which you based that conclusion? A. Your Honor, yesterday I was given permission—

Mr. Isserman: I object, if the Court please.

The Court: No; you asked the witness if there was any other fact—

Mr. Isserman: Yes, but the witness—

The Court: Just a moment. The Court is speaking. You asked the witness if there was any other fact besides the two that have been mentioned which led him to that conclusion. The witness may state if there is such a fact or facts; and if so, what the fact or facts are.

Mr. Isserman: Well, the witness was addressing his remarks to the Court.

The Court: Now, I have ruled. Do not argue with me after I have ruled.

By the Court:

Q. You may proceed, Mr. Thomas. A. Yesterday, Your Honor, I was given permission to refer to the transcript of the proceedings—

Mr. Isserman: If the Court please, I must object to the manner in which this witness is answering the question. The question is simple. I asked him what other fact exists.

122 The Court: You have noted your objection. The objection is overruled. If the answer is not responsive, you may move to strike it.

By the Court:

Q. You may proceed. A. Yesterday, Your Honor, I was given permission by the Court to refer to the transcript of proceedings. I should like to ask Your Honor if I may again, or continue to, refer to this transcript of proceedings in order to refresh—

Q. You may continue. If you have no independent recollection concerning any matter regarding which you are in-

terrogated, and you feel that your recollection can be refreshed by referring to the transcript of the proceedings, you may refer to them. A. Your Honor, I do feel my recollection can be refreshed by referring to the proceedings.

Q. You may refer to them; and the pending question is whether there is any other fact or facts other than those you have mentioned—other than the two which you have mentioned—which lead you to the inference or conclusion that the defendant appeared in response to a subpoena.

Mr. Isserman: May the record indicate that the witness is referring to a transcript of proceedings?

The Court: No. Do not interrupt the witness' answer.

Mr. Isserman: If Your Honor please, the witness
123 has some papers in his hand. I think they should be identified for the record.

The Court: You have a right to ask the witness. The proper method of procedure is for you to ask the witness what are the papers he has in his hand; but you may do that after he answers the pending question, unless you wish to withdraw the pending question.

Mr. Isserman: I do not wish to withdraw the pending question.

The Court: The witness will answer the pending question; then, if you wish, you may ask him what paper he was referring to.

Mr. Isserman: Very well.

The Witness: Yes, I was informed by both the chief investigator and one other investigator of the Committee on Un-American Activities that a subpoena had been served on Gerhart Eisler and that he was there in response to that subpoena.

By Mr. Isserman:

Q. Now, is there any other fact upon which you base your statement that Mr. Eisler appeared before the Committee on February 6, 1947, in response to a subpoena? A. I don't recall any.

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Q. You don't know of any other fact? A. I don't recall any.

124 Mr. Isserman: May I have the reporter read the answer of the witness previous to the last two?

The Reporter: (Reading) "Yes, I was informed by both the chief investigator and one other investigator of the Committee on Un-American Activities that a subpoena had been served on Gerhart Eisler and that he was there in response to that subpoena."

By Mr. Isserman:

Q. Is there anything in the record from which you refreshed your recollection, Mr. Thomas, which states that the investigators informed you that Mr. Eisler had been served with a subpoena and appeared in response to the subpoena? A. I don't see anything in the record.

Q. Your last answer was given after you refreshed your recollection from the record. Will you tell us what part of the record you referred to? A. No, that was not my answer. My answer was not that I had seen it in the record, but my answer was that I knew from the fact that the chief investigator and the investigator had informed me that a subpoena had been served on Gerhart Eisler and that he was there in response to that subpoena.

Q. What is the name of the Chief investigator who informed you that Mr. Eisler was there in response to

125 a subpoena? A. Robert Stripling.

Q. Who was the assistant investigator who informed you that Mr. Eisler was there in response to a subpoena? A. Louis Russell.

Q. Did either of those two investigators inform you of the facts upon which they told you that Mr. Eisler was there in response to a subpoena? A. No additional fact other than that a subpoena had been served and that he was there in response to a subpoena.

Q. You mean that he was present, brought in by two guards? A. That he was there in response to a subpoena,

because there was some doubt in my mind whether Gerhart Eisler would ever show up.

Mr. Isserman: I ask that that remark be stricken as not being responsive.

The Court: It may be stricken. Just state your motion; do not argue.

Mr. Isserman: I have not argued; I just stated my ground.

By Mr. Isserman:

Q. Then, you say the fact which the chief investigator mentioned to you, that Gerhart Eisler was there in response to a subpoena, was because he had been served with a subpoena. Was there any other fact which the chief investigator mentioned? A. And because he was present in the building.

126 The Court: Are you through with this witness?

Mr. Isserman: I am through with this question, if the Court please.

By Mr. Isserman:

Q. Now, in yesterday's testimony, Mr. Thomas, didn't you testify in response to the question, "Do you recall what Mr. Eisler's reply was?"—

The Court: What page are you reading from?

Mr. Isserman: Page 62 of the transcript.

By Mr. Isserman:

Q. I am quoting now: "'Mr. Eisler replied that he would not testify."

That was your testimony yesterday, was it not? A. That is correct.

Q. Now, will you turn to the transcript of the hearing of February 6, which is in your hand, and tell me what statement of Eisler's is the reply that he would not testify?

The Court: Well, now, that transcript is not yet in evidence. It has been used by the witness only on occasion to refresh his recollection.

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Mr. Isserman: I am now testing his—

The Court: Are you offering it in evidence?

Mr. Isserman: I am not. I am now testing the witness as to the statement which he said was given in response to his request.

By the Court:

127 Q. I will first ask whether that answer was given by the witness from his recollection or whether he gave that answer after refreshing his recollection by referring to the transcript. A. That answer was given, as I recall, from my recollection. However, your Honor, I would be very glad to answer the question now, if I may.

Q. Yes, you may. A. On page 1: "The Chairman. Now, Mr. Stripling, call your first witness."

"Mr. Stripling. Mr. Gerhart Eisler, take the stand."

"Mr. Eisler. I am not going to take the stand."

"Mr. Stripling. Do you have counsel with you?"

"Mr. Eisler. Yes."

"Mr. Stripling. I suggest that the witness be permitted counsel."

Mr. Isserman: If the Court please—

The Witness: "The Chairman. Mr. Eisler, will you raise your right hand?

Mr. Isserman: Just a moment, please.

The Court: Just a moment. If there is any admonishing of the witness to be done, that is the Court's function.

Mr. Isserman: I do not want to admonish the witness, but I want an opportunity to state an objection before the witness continues.

128 The Court: The witness is answering a question, and the witness will continue.

The Court will inform counsel again that in this court it is not the practice to note objections in the middle of a witness' answer.

Mr. Isserman: If the Court please—

The Court: You may move to strike the answer if it is not responsive, after the answer is completed. I think,

however, that the answer of the witness is entirely responsive.

By the Court:

Q. You may proceed.

Mr. Isserman: If the Court please—

The Court: Your exception is noted.

By the Court:

Q. You may proceed.

Mr. Isserman: May I state the grounds of my exception?

By the Court:

Q. Proceed. A. "The Chairman. Mr. Eisler, will you raise your right hand?

"Mr. Eisler. No. Before I take the oath—"

"Mr. Stripling. Mr. Chairman—"

"Mr. Eisler. I have the floor now."

"Mr. Stripling. I think, Mr. Chairman, you should make your preliminary remarks at this time, before Mr. 129 Eisler makes any statement."

"The Chairman. Sit down, Mr. Eisler.

"Now, Mr. Eisler, you will be sworn in. Raise your right hand."

"Mr. Eisler. No."

"The Chairman. Mr. Eisler, in the first place, you want to remember that you are a guest of this Nation."

"Mr. Eisler. I am not treated as a guest."

"The Chairman. This committee—"

"Mr. Eisler. I am a political prisoner in the United States."

"The Chairman. Just a minute. Will you please be sworn in?"

"Mr. Eisler. You will not swear me in before you hear a few remarks."

"The Chairman. No; there will be no remarks."

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"Mr. Eisler. Then there will be no hearing with me."

"The Chairman. You refuse to be sworn in? Do you refuse to be sworn in, Mr. Eisler?"

"Mr. Eisler. I am ready to answer all questions, to tell my side."

"The Chairman. That is not the question. Do you refuse to be sworn in?

"All right."

"Mr. Eisler. I am ready to answer all questions."

130 "The Chairman. Mr. Stripling, call the next witness."

"The committee will come to order, please."

And so on.

By Mr. Isserman:

Q. Does that finish— A. I can continue to read it, if you want me to.

Mr. Isserman: If the Court please, at this point I move that the answer of the witness be stricken as being not responsive.

The Court: Motion denied. It is the view of the Court that it is precisely responsive to the question. The question was, in substance, what there was in the transcript of the hearing to justify the witness' answer that the defendant had refused to be sworn. Motion denied.

By Mr. Isserman:

Q. Now, Mr. Thomas, you were reading from a transcript of the hearing, were you not? A. That is correct.

Q. Have you read all the questions and answers which deal with Mr. Eisler's refusal to be sworn. A. Up to that point. I shall be glad to continue.

Q. Just a moment; you will get an opportunity to continue.

The Court: Do not argue with the witness.

Mr. Isserman: Well, the witness was remonstrating with counsel. I ask that he be admonished to answer the question.

131 The Court: I suggest to counsel that he proceed as counsel should.

Mr. Isserman: I wish to make objection to your Honor's remark and ask that it be stricken.

The Court: Motion denied. Counsel's function on cross-examinaton of a witness is solely to ask questions and not to remonstrate with the witness.

Now, proceed and ask the next question.

By Mr. Isserman:

Q. Now, you say, Mr. Thomas, that up to this point you had read all the questions and answers which dealt with Mr. Eisler's refusal to be sworn; is that correct? A. It is my opinion I read them all, yes, with—

Q. Having refreshed your recollection by this reading, would you say that the questions and answers as read by you up to the point at which you stopped are a correct transcript of all the questions that were asked and answered at the hearing up to that point? A. I would say they were very correct.

Q. Would you continue, and read any additional questions and answers which were put to Mr. Eisler in respect to the charge that he refused to be sworn? A. "The Chairman. What is the pleasure of the committee?"

"Mr. Stripling. Mr. Chairman, I think that the witness should be silent, or take the stand or be removed

132 from the room, one or the other, until this matter is determined."

"Mr. Mundt. Mr. Chairman, suppose you ask him again whether he refuses to be sworn."

"Mr. Rankin. Not 'sworn in', but to be sworn."

"The Chairman. Mr. Eisler, do you refuse, again, to be sworn?"

"Mr. Eisler. I have never refused to be sworn in. I came here as a political prisoner. I want to make a few remarks, only 3 minutes, before I be sworn in, and answer your questions, and make my statement. It is 3 minutes."

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"The Chairman. I said that I would permit you to make your statement when the committee was through asking questions. After the committee is through asking questions, and your remarks are pertinent to the investigation, why, it will be agreeable to the committee. But first you have to be sworn."

"Mr. Eisler. That is where you are mistaken. I have to do nothing. A political prisoner has to do nothing."

"The Chairman. Then you refuse to be sworn?"

"Mr. Eisler. I do not refuse to be sworn. I want only 3 minutes. Three minutes to make a statement."

"The Chairman. We will give you those 3 minutes when you are sworn."

"Mr. Eisler. I want to speak before I am sworn."

"Mr. Mundt. Mr. Chairman, I make the motion that the witness be cited for contempt."

133 "Mr. Rankin. I second the motion."

"The Chairman. Any discussion?

"All in favor signify by saying 'Aye.'

"Motion carried.

"The witness will be cited for contempt."

Mr. Isserman: Now, if the Court please, I ask that the witness' answer beginning with the statement by Mr. Mundt: "Mr. Chairman, I make the motion that the witness be cited for contempt," be stricken as not being responsive to the question.

The Court: It may be stricken.

Mr. Isserman: Did the reporter get that?

The Court: You do not have to worry about the reporter; he gets my rulings.

Mr. Isserman: He seemed to indicate some doubt.

The Court: He has been reporting here for a good many months.

Mr. Isserman: So as to be sure, I understand the Court to rule that the matter will be stricken.

By Mr. Isserman:

Q. Now, Mr. Thomas, have you read all the questions and answers upon which you charge that Mr. Eisler refused to be sworn and refused to testify? A. Up to that point?

Q. Yes. A. I read everything in there except a
134 statement by me. Do you care to have me read that statement?

Q. I have asked you whether you recollect any more questions by you or any other member of the committee, and any answers by Mr. Eisler, which bear on your charge that he refused to be sworn and refused to testify? A. I don't know that I skipped any of them.

Q. Isn't it also true, Mr. Thomas, that in your testimony of yesterday you were relying upon the facts—upon the questions and answers which you have read here this morning? Isn't that true? A. I was relying on my recollection of what happened at the hearing.

Q. Now, to the point at which your recollection, as you testified to it yesterday, differs from the questions and answers which you read from the transcript this morning—to the point at which they differ—would you say that the transcript is correct or that your recollection is correct? A. I am positive that the transcript is correct.

Q. So that wherever the transcript conflicts with your recollection of yesterday, the transcript is correct? A. Oh, I would much prefer the transcript.

Q. Now, as Chairman of the Committee on Un-American Activities will you describe to us the procedure that you have to allow a witness to state an objection to a
135 proceeding when he appears before the committee?

A. In the first place, as was stated yesterday, all witnesses are sworn. That is the first step. Naturally if we can't get beyond that, there is no second step.

Q. Now— A. And, as in this case, there was no second step.

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The Court: Just a moment. I do not think the witness has finished his answer.

Mr. Isserman: I would be very glad to let him finish.

By the Court:

Q. Proceed. A. No, your Honor; I had finished my answer.

By Mr. Isserman:

Q. You have finished? A. I have finished.

Q. Now, if a witness has a legal objection to the committee's right to swear him in, what procedure has the committee established to allow that witness to make the objection?

Mr. Hitz: Please do not answer until I object.

I do object; it is immaterial in this case.

The Court: I think I am going to let him answer. Objection overruled.

The Witness: But there was no legal objection in this case. He just would not be sworn. The question of
136 legality did not enter into it. Even his attorney didn't say a word.

Mr. Isserman: If the Court please, I ask that the answer be stricken as not being responsive.

The Court: Motion denied.

By Mr. Isserman:

Q. Mr. Thomas, if a witness wants to object because he believes he has legal reasons why he should not be sworn, how does your committee give him that opportunity under its procedure? A. He should certainly, at least, attempt to make some statement as to his legal objections; but in this case there was no statement made as to his legal—

Q. Do you know what remarks Mr. Eisler was going to make in the three minutes he asked for? A. I found out you couldn't make that statement in three minutes. It was 20 pages long.

Mr. Isserman: Just a moment, please. I ask that the answer be stricken as not being responsive.

The Court: Well, ask the question again.

Mr. Isserman: Is there a ruling on my matter?

The Court: Motion denied.

Mr. Isserman: But the question is being asked again?

The Court: You may ask the question again, if you think the answer is not responsive.

Mr. Isserman: I believe it is not responsive, and I
137 ask that the answer be stricken.

The Court: Ask the question again.

Mr. Isserman: Will you once more repeat the question, please?

The Reporter: (Reading) "Question. Do you know what remarks Mr. Eisler was going to make in the three minutes he asked for?

The Witness: When he first asked for the three minutes, no; but—

By Mr. Isserman:

Q. You have answered the question, Mr. Congressman. A. But, your Honor—

Mr. Isserman: I object, your Honor.

The Court: I think that may be brought out on redirect examination. I think the question has been answered.

By Mr. Isserman:

Q. Now, Mr. Thomas, you say that the attorney for Mr. Eisler, Mrs. King, who is sitting at counsel table, made no effort to state any objection; is that your best recollection? A. There is one sentence in this testimony which indicates the only time that Mrs. King made any effort to do anything other than give out a lot of papers.

Q. Just a minute. That sentence was addressed to you by Mrs. King, was it not?

138 Mr. Hitz: What sentence are you talking about?

Mr. Isserman: The sentence the witness has just

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referred to. He knows what sentence I am talking about.

The Court: Let us not have any colloquy.

Mr. Isserman: Well, I would like to get an answer from the witness.

The Court: Will counsel come to the bench, please?

(Counsel for both sides approached the bench, and the following occurred:)

The Court: Mr. Isserman, the Court appreciates the fact that you are from out of town. I do not know what the practice is in your jurisdiction, but in this court the custom is for counsel to be urbane, courteous, and civil, and not to speak abruptly or opprobriously.

Mr. Isserman: I want to object to your Honor's remark and ask that it be stricken from this record, because there is no basis for it.

The Court: I did you the courtesy of saying this at a bench conference, so that the jury should not hear my remarks; but you do not take them in the spirit in which they are intended. If you are not going to be urbane and courteous, I shall the next time I have to call attention to the fact do it in the presence of the jury.

Mr. Isserman: Will your Honor hear me?

The Court: No.

139 Mr. Isserman: I move that your Honor's remarks be stricken, as indicating nothing that has happened in this courtroom. I think counsel should be allowed leeway in cross-examination, especially when a witness is under oath.

The Court: They are allowed leeway, but they must always be within the bounds of courtesy.

Mr. Isserman: I believe I have observed those bounds.

The Court: No, you have not, particularly in the way you addressed the Court. Abruptness is not permitted. No local counsel ever departs from an urbane, courteous manner to the Court.

Mr. Isserman: I will try to be courteous and urbane in my remarks.

The Court: I am trying to help counsel, because if you were a member of this bar and you acted like that, the consequences would be much more severe. However, I know that perhaps—well, I do not know what the custom is where you practice, so I want to give you the advantage of a warning in advance.

Mr. Isserman: I wish to state that I intend, and have intended, to be courteous and urbane to the Court. At the same time, the defendant has rights which counsel must protect.

The Court: Yes. I have very little use for counsel who do not try to protect their clients' rights; but that can be done courteously.

140 Mr. Isserman: It is my intention to be courteous.

The Court: I know you intend that—I am quite sure you do—but that is not the type of thing that is customary in this court.

Mr. Isserman: I will try to conform my manner to the Court's conception of courtesy.

The Court: Very well. You may proceed.

(Counsel returned to the trial table, and the following occurred:)

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Mr. Isserman: May I get the last question?

The Reporter: (Reading) "Question. Now, Mr. Thomas, you say that the attorney for Mr. Eisler, Mrs. King, who is sitting at counsel table, made no effort to state any objection; is that your best recollection?"

By Mr. Isserman:

Q. Now, would you read the question, which still remains unanswered, please? A. On page 4, top of the page:

"Miss Carol King. May I be heard, Mr. Chairman?"

What did you answer, Mr. Chairman?

141 A. I didn't answer anything.

Q. Well, what did you do after Mrs. King said, "May I be heard?" A. Well, prior to that the committee

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had voted to cite this man for contempt. We were dismissing the witness. Miss King said nothing until we had decided to dismiss the witness.

Q. What did you answer when Mrs. King said, "May I be heard, Mr. Chairman?" A. "Take the witness out."

Q. Did you recognize Mrs. King after she had made that request to be heard? A. It was too late then—too late.

Q. It was too late? That is why you did not recognize her? A. Yes.

Q. That is why you did not recognize her? A. Yes; it was too late.

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Mr. Hitz: Your Honor, at this time the Government would like to offer so much of the official Government Printing Office report of the proceedings on the 6th of February, 1947, before the committee that we have been referring to, as is contained on page 1 of that report, the last line thereof, all of page 2, and page 3 down to the statement that was made by Mr. Mundt, a little below the middle of the page.

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Mr. Isserman: If the Court please, we object to the introduction of the portion of the transcript referred to by the United States Attorney on the ground that the same is hearsay and on the further ground that the same contains irrelevant material, which would be highly prejudicial to the defendant.

The Court: The fact that something is prejudicial is not—

Mr. Isserman: I said irrelevant material.

The Court: Oh, yes.

Mr. Isserman: And on the further ground that it contains material which is not within the four corners of the indictment, and on which the Court previously refused a bill of particulars; and on the further ground that the witness now on the stand has testified to all the questions and answers upon which the charge was made that the witness refused to be sworn and refused to testify.

Also, if the Court please, as I believe I have stated, on the ground that it is hearsay and not the best evidence, and that no foundation has been laid for the introduction of the document.

143 The Court: Well, I think it is both relevant and material; but, Mr. Hitz, I am not sure whether it is technically competent, because this transcript has not been identified, has it?

Mr. Hitz: It states on the front of it that it is an official record, I believe, your Honor.

The Court: I know, but I think if an official record is introduced in a criminal case, if objection is made, the person who took the transcript must be produced to verify it, or there must be some other means of identifying it.

However, I want to add this: That portion is already in the record, and is part of the evidence in this case in another manner, because the witness Mr. Thomas read that portion in answer to the question propounded on cross-examination. So I personally think that the objection, even if sustained, does not amount to anything, because that portion is already in evidence; it was just read by Mr. Thomas.

So I will sustain the objection at this time but call your attention to the fact that it is otherwise in evidence.

Mr. Hitz: I merely wanted to complete the record. Your Honor suggested yesterday that perhaps it would be better to have it in. That was the principal reason.

The Court: I think so too. I think it would be helpful to have this transcript in evidence; but if objection is made, I, of course, have to rule on it; and technically, in

144 order to make this document admissible, it would have to be identified by the reporter. But, as I say, the material that you referred to has already been referred to by this witness.

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The Government rests.

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Mr. Rein: * * *

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I would like to move now for a judgment of acquittal on the first ground that the indictment does not state an offense under the statute.

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As our second ground we would like to move for judgment of acquittal on the ground that the Government has failed to prove in this case that the defendant refused to be sworn.

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Mr. Rein: I think the Government has failed to produce any evidence that the default, if there was a default, was a wilful default.

* * * * * * * * * *

I think the Government has failed to prove, there has been no proof in the case, and it is our contention that it has failed to prove that Mr. Eisler was called on a matter of inquiry submitted to the Committee by the resolution; there has not been one shred of evidence on that.

* * * * * * * * * * *

Mr. Rein: The next point is that on the Government's own testimony, as well as the opening statement made by counsel for the Government, it shows that the defendant was in custody of officers during the entire time before, during the hearing, and after the hearing, and that since he was in custody nothing he could do would have been his voluntary act. He could not have voluntarily appeared in response to a subpoena.

* * * * * * * * * * *

The Court: The Court does not care to hear Government counsel because these matters they rely upon have been argued before on a motion to dismiss the indictment. It is the view of this Court that the indictment is sufficient and, therefore, the motion for judgment of acquittal

on the alleged ground of insufficiency of the indictment will be denied.

The question presented by counsel is whether failure to take the oath after the witness appeared before the Committee may be a wilful default within the meaning of the U. S. Code, Title 2, Section 192. The Court holds that it may be. This section was construed in the case of Townsend against the United States, 68 Appeals, D. C., 223. In that case counsel argued, as counsel has in this case, that the statute was intended to cover only two situations; one, that the witness who having been summoned failed to appear at all, or, two, who having appeared refuses to answer pertinent questions. The Court held that the statute is not limited to those two situations, and that the term "appeared" means, in effect, an effective appearance. Now,

152 the precise point presented in that case was whether a witness who appears and then walks out of the hearing may be deemed to be in default under the statute. The Court answered the question in the affirmative. The precise point involved here was not involved in the Townsend case, to be sure, but the Townsend case does hold as I have indicated, that the statute is not limited to the two situations to which counsel contends in this case, and also that the word "appear" should be construed to mean an effective appearance.

Now, it seems to the Court for a witness to appear physically and then refuse to take an oath is as much a frustration of his appearance as it is to walk out of the hearing after he has physically appeared. On the basis of the Townsend case I am going to hold that the indictment is sufficient, and the failure to be sworn is a default under the statute.

The second ground of the motion is directed to the question whether the Government has offered sufficient substantial evidence to justify sending the case to the jury. The Court holds that the Government has offered substantial evidence. There is proof that the defendant refused to

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take the oath except on his own condition. Of course, a witness before a tribunal has no right to prescribe conditions under which he will testify. I think there is enough evidence from which the jury has a right to infer that the default was wilful. That is a question of fact for the jury to determine, not a question for the Court. Wilful-
153 ness, intent, motive, and all matters of that type can be inferred only from circumstances because they can very rarely, if ever, be proven directly. The Court also holds that the regularity of the Committee proceedings will be presumed, especially in light of the fact that there has been competent proof of the creation of the Committee, and that the Government is under no obligation to prove what questions would have been addressed to the witness had he taken the oath.

I am going to deny the motion.

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154 **Opening Statement on Behalf of the Defendant.**

Mr. Isserman: May it please the Court, and ladies and gentlemen of the jury: The defendant in this case, as you have been told, is charged with having been summonsed as a witness before the House Committee on Un-American Activities to appear at its session in the District of Columbia on February 6, 1947.

It is further charged that he did appear before that Committee, and that when he was there he was directed to be sworn to testify, and that he had refused, and that in his refusal the refusal was wilful, and that he did not intend to be sworn to testify.

155 On the face of it it would seem like a very simple case, and there is no question about the fact that on or about January 24th this defendant was subpoenaed to appear before the House Committee on Un-American Activities. In fact, as the testimony shows, he arranged to be served with subpoena, making it easy for Mr. Russell, who had the subpoena, to come to his house, and waited for him to serve the subpoena, and we will show from that time and,

in fact, from before that time on, because that was not the first subpoena the defendant had received, he at all times intended to appear and intended to answer the questions which were to be put to him which were pertinent to the matters under inquiry, because the law says you have only to answer pertinent questions, that you do not have to answer all questions, and that he was quite willing to testify on all matters pertinent to the scope of the inquiry of the Committee; but between January 24 and February 6, 1947, a number of events took place which changed the whole circumstance of the appearance of this witness before the Committee.

On January 31 it will be shown that Mr. Parnell Thomas, the Chairman of the Committee—

Mr. Hitz: May I interrupt to object to this?

The Court: I want to hear a little more. Proceed.

Mr. Isserman: As I was saying, we will show that on January 31 Mr. Parnell Thomas, the Chairman of
156 the Committee, sent a letter to the Attorney General about Mr. Eisler—

The Court: Now, I am not going to permit you to refer to anything of that kind.

Mr. Isserman: May I state what I intend to show?

The Court: No, you may not state evidence which the Court believes will probably be excluded because that would be one way to get incompetent and inadmissible matters before the jury. We do not do that.

Mr. Isserman: May I state my ground for introducing the evidence?

The Court: Yes, you will state to the Court when the Court hears you on the admissibility of the evidence.

Mr. Isserman: If the Court please, the defendant has a number of separate defenses to this indictment, and each of these defenses requires the proof of certain facts. As counsel, I believe—

The Court: I will not hear argument at this time. You proceed with your opening statement, but the Court ex-

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cludes the matter which you were about to divulge from your opening statement.

Mr. Isserman: Now, we will show that as a result of actions taken by the Chairman of the Committee on Un-American Activities that Mr. Eisler was arrested on February 4, 1947.

Mr. Hitz: May I interrupt just a minute? I dislike to interrupt, but I make an objection; I think enough
157 has been said now to indicate that the matter is immaterial.

The Court: Yes, I think it is not material.

Mr. Isserman: May I state my ground?

The Court: Mr. Isserman, I am accustomed to confine every trial to the issue in the case. The only issue in this case is that there was a refusal to testify and whether the default was wilful.

Mr. Isserman: May I state to the Court what I intend to prove under this statute, and the reasons—

The Court: Not at this time.

Mr. Isserman: I am faced with this problem; I have a great many questions which I wish to refer to, and if the Court wishes to hear from me I will state them briefly to get the wishes of the District Attorney and the ruling of the Court.

The Court: I do not think it is advisable. It is not the custom to permit in an opening statement matters which the Court will exclude. For instance, if Government counsel would do it it would be grounds for a mistrial. Of course, under our law a mistrial cannot be predicated on anything said by defense counsel. Nevertheless, defense counsel are governed by the same rules as to relevancy, and I will not permit it because I shall probably exclude it.

Mr. Isserman: Of course, the defense counsel is not in a position to anticipate what the rulings will be.

158 The Court: I understand; I am not finding fault with you.

Mr. Hitz: May I make this statement, that I do not think counsel should be permitted to proceed in this way, knowing from what he has thus far said what the Court will say.

The Court: I think I will make the ruling now at the bench.

Mr. Hitz: That is what I suggest.

(Counsel for both sides approached the bench and the following occurred:)

The Court: I am not going to permit you to refer to any correspondence between the Attorney General and Chairman Thomas as I consider it irrelevant.

Mr. Rein: Your Honor, may we have a brief discussion at this time as to why we think it is relevant, just briefly?

The Court: What is your point?

Mr. Rein: I have a great many legal contentions, but just restricting this to one, you said that wilfulness will depend on all the circumstances themselves, and it seems to me that if we want to prove that this man's conduct was brought about by his arrest and the condition of the arrest, that is essentially not a wilfulness.

The Court: Now, I will exclude that. I will let you prove, in fact it is already in evidence, that he was
159 under arrest at the time he was before the Committee, and you may argue it to the jury in summing up, if you wish. If you feel that to be desirable you may argue it to the jury, but events that transpired before that day had nothing to do with wilfulness, because, as I construe it, it must be deliberate and intentional and not accidental, and bearing that in mind I think the events that transpired previous to the appearance of the witness before the Committee are too remote.

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161 Mr. Isserman: If the Court please, may the record show what the defense is that we offer?

The Court: No, you can have all these incorporated in the transcript, if you wish.

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Mr. Isserman: I would like to have them incorporated in the transcript.

The Court: Very well.

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163 Mr. Isserman: Am I then to understand that the Court is instructing counsel that in addressing the jury I refer only to matters which occurred on February 6, 1947?

164 The Court: Yes; the Court is not instructing counsel. The Court does not give counsel any instructions, but the Court rules that he may not refer to any matters in his opening except to matters that transpired on February 6, the date of the hearing.

Mr. Isserman: At the hearing.

Mr. Hitz: At the hearing.

Mr. Isserman: At the hearing, and all matters that preceded the hearing that morning?

The Court: Matters that transpired that day.

Mr. Isserman: Does that include, for instance, the instruction which the guards got to bring him into the hearing room?

The Court: I beg pardon?

Mr. Isserman: Does that include instructions to the security officers before they took Mr. Eisler from the room, I mean the hearing room?

The Court: What were those instructions?

Mr. Isserman: We are going to refer to them.

The Court: What are you going to say in your opening statement?

Mr. Isserman: We want to show that these persons were instructed, and who instructed them, and ultimately to show that the instruction came from Mr. Thomas.

The Court: No, I am not going to permit you to
165 show from whom they were obtained. The only fact is that the defendant was brought by the officer.

Mr. Hitz: I fail to see the relevancy of the fact that he was in custody.

The Court: I am going to rule as a matter of law that it is not relevant, but I am going to permit him to prove that. I am going to rule as a matter of law it is not a defense because I hold that a person in custody can be compelled to testify and, as a matter of fact, the fact that he was in custody is already in the record.

Mr. Isserman: And the fact that he remained in custody throughout the hearing, and that the officers were instructed to bring him in and take him back.

The Court: It has already been proven that he came here in custody and he was taken away in custody.

Mr. Isserman: Will you allow us to allude to the fact that he was in custody during the hearing, and remained in custody?

The Court: Well, you may proceed.

. . . . . .

166 Mr. Isserman: It is part of our proof to establish that the defendant had with him certain documents which he had previously prepared, and that he intended to make certain statements which he had arrived at previous to the date in question. I am not quite clear by Your Honor's ruling as to what I may say as to that.

The Court: Yes, you may. That will go to wilfulness.

. . . . . .

(The five offers of proof referred to by counsel in the conference at the bench, and which the Court stated could be incorporated in the record, are in the words and figures following, to-wit:)

"First Offer of Proof

"The defendant contends, as a defense to the indictment, that as an alien in transit he was not subject to subpoena by the House Committee on Un-American Activities and was not bound to testify before the same Committee.

"In support of this contention, the defendant offers to prove the following facts:

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"a. That he entered the United States as an alien
167 in transit on June 14, 1941, under Section three (3) of the Immigration Act of 1924;

"b. That he never applied for any change of status;

"c. That he never applied for or obtained the status of an immigrant for permanent resident in the United States;

"d. That from and after June 14, 1941, until May 8, 1945, the defendant was a continuous applicant to governmental authorities for permission to leave for Mexico for which he entered the United States; and

"e. That from and after the termination of hostilities with Germany, continuously applied for an exit permit authorizing his departure from the United States.

"The applications mentioned in items (d) and (e) were denied.

"Second Offer of Proof

"The defendant contends as a defense to the indictment, that as an interned enemy alien the defendant was entitled to the rights and privileges accorded prisoners of war by the Geneva Convention ratified by the United States in 1932 and as such could not be required to testify before the Un-American Activities Committee, and in support of this contention the defendant offers to prove the following facts:

"a. That he was arrested on February 4, 1947, as an enemy alien pursuant to Presidential Proclamation 2526, promulgated December 8, 1941; and
168 "b. That thereafter he was detained and interned as an enemy alien in accordance with the terms of the said proclamation until April 15, 1947.

"Third Offer of Proof

"The defendant contends as a defense to the indictment that he was unlawfully arrested on February 4, 1947, by federal officers and unlawfully detained from February 4, 1947 to April 15, 1947, and was unlawfully transported to the Committee on February 5th and 6th and was in unlaw-

ful custody when he was present before the Committee on Un-American Activities on February 6, 1947, and that being in custody he did not appear voluntarily in response to the subpoena, and in support of this contention the defendant offers to prove the following:

"a. That on January 31, 1947, J. Parnell Thomas, Chairman of the House Committee on Un-American Activities wrote to Attorney General Tom Clark requesting that he keep under surveillance the defendant, Gerhart Eisler, and to take all steps necessary to insure Eisler's appearance before the same House Committee on Un-American Activities on February 6, 1947;

"b. That as a result of such letter and subsequent phone conversations between Parnell Thomas and Attorney General Clark or his representatives, it was decided to arrest the defendant as an enemy alien for the purpose of insuring the appearance of the defendant before the said
169 committee;

"c. That the arrest of the defendant was ordered solely because of the request of Parnell Thomas;

"d. That the defendant had been born in Leipzig of Austrian parentage;

"e. That the defendant never became a German citizen;

"f. That under the law of both Germany and Austria, the defendant was a native of Austria and not a native of Germany;

"g. That from June 4, 1941, until February 4, 1947, with full knowledge of all the facts recognized the defendant's status as an Austrian native and citizen in that the government did not require him to register as an alien enemy or apply any restriction applicable to alien enemies.

"h. That, with the exception of the defendant, no person had been arrested as an enemy alien from July 20, 1945, to date;

"i. That, subsequent to July 20, 1945, instructions were issued within the Department of Justice that no more persons should be arrested and interned as enemy aliens, and

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that those persons already in custody should either be released or deported;

"j. That the arrest of the defendant was in violation of these instructions and in violation of the established policy of the Department of Justice to cease the apprehension and internment of enemy aliens subsequent to July 20, 1945;

"k. That the arrest of the defendant was not be-
170 cause of his alleged status as an enemy alien but solely because the request of J. Parnell Thomas as Chairman of the House Committee on Un-American Activities;

"l. That he was arrested on February 4 and taken to Ellis Island;

"m. That on February 5, while being questioned at Ellis Island, two men, Steve Greenman and Arthur J. Brosman, security officers of the Immigration and Naturalization Service, Department of Justice, took him into custody and took him to Washington, D. C.;

"n. That they there placed him in a jail in Washington, D. C.;

"o. That on the morning of the 6th, they took him from the jail and still in their custody brought him to the hearing room of the House Committee on Un-American Activities;

"p. That these two men, Greenman and Brosman, acted in accordance with instructions received from the office of the Attorney General in Washington, D. C.;

"q. That these instructions were in turn given at the request of the House Committee on Un-American Activities; that the Chairman or some other representative of the House Committee on Un-American Activities requested the Attorney General of the United States to have the defendant brought down in custody to Washington and to the hearing room of the said committee;

171 "r. That the Attorney General and his subordinates in bringing the said defendant to Washington, D. C., and to the hearing room of the said Committee acted without lawful court process or any other process;

"s. That no attempt was made by the Attorney General or his subordinates to secure any lawful court process or any other process;

"t. That the defendant never requested to go to Washington, D. C., to attend the hearing of the House Committee on Un-American Activities;

"u. That the defendant was never asked whether he was willing to go to Washington or to attend the said hearing;

"v. That the defendant was in fact unwilling, as long as he was in what he considered to be unlawful custody, to go to Washington or to attend the hearing, and only submitted himself to be taken to Washington and the hearing in recognition of superior force.

"Fourth Offer of Proof

"The defendant contends, as a defense, that the alleged was not wilful and the defendant offers to prove the following the facts in support of this contention:

"a. The defendant was first subpoenaed by the House Committee on Un-American Activities 79th Congress on or about November 22, 1946, by subpoena bearing that date and returnable in St. Louis on November 23, 1946.

172 "b. Subsequently defendant was again subpoenaed to appear before the House Committee on Un-American Activities in Washington on November 22, 1946.

"c. Pursuant to said subpoena defendant appeared at the committee offices on November 22, 1946.

"d. At said offices the defendant was advised by one Carrington the then clerk of said committee that he was not needed in that day and that a telegram had been sent to him to that effect.

"e. Only upon his return to New York defendant found such telegram.

"f. Defendant was on such appearance ready and willing to testify before the House Committee on Un-American Activities.

"g. Defendant received no further communication from the House Committee on Un-American Activities until he

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was served on January 24th with a subpoena to appear before the House Committee on Un-American Activities 80th Congress on February 6, 1947.

"h. Defendant facilitated the service of said subpoena by Louis J. Russel, Committee investigator by arrangement with said investigator to be available at his home for such service at a time certain.

"i. Defendant upon being served with subpoena returnable February 6, 1947, fully intended to testify be-
173 fore the House Committee on Un-American Activities.

"j. Defendants made the following preparation for appearing at the hearing scheduled for February 6:

"1. Prepared mimeographed statement to read before and file with committee after having been sworn said statement being complete in draft by Sunday, February 2, 1947.

"2. That said statement on page 18 of the mimeographed copy contained the following statement:

" 'I am fully conscious of the fact that I had to speak under oath and therefore I tried to speak to the best of my knowledge—'

"3. Arranged to meet his attorney, Carol King, in Washington on February 5.

"4. Arranged on January 30 and February 3, by telegram through his attorney, Carol King, for reservation for himself and his wife at the Willard Hotel on February 5.

"5. Purchased coach railroad tickets to Washington for himself and wife on February 3, 1947, defendant having tickets so purchased and stamped February 3, 1947 still in his possession.

"k. That defendant believed he could be allowed to read and file his statement with the Committee and that said belief was based on reasonable ground including the fact that a witness against him before the House Committee on Un-American Activities on November 22, 1947 (one
174 Louis Budenz) had been given unlimited time for making statements and the fact that defendant had

been advised by counsel that such statements were generally permitted on appearance before Congressional Committees.

"1. That defendant was arrested on February 4, 1947 as a dangerous enemy alien under Presidential warrant issued by the Attorney General, and was brought to Washington on February 5, 1947 under guard and to the hearing room of the House Committee on Un-American Activities on February 6, 1947.

"m. That the defendant believed that his arrest on February 4, 1947, his detention, transportation to Washington and compulsory delivery under guard to the hearing room of the House Committee on Un-American Activities on February 6, 1947 was illegal.

"n. That defendant's belief that the actions of the agents of Department of Justice, in his arrest and subsequent steps were illegal was based on the reasonable ground that he had been advised by counsel to that effect, that counsel had instituted a court proceeding to obtain his release and that the Department of Justice had on a number of occasions and over a considerable period recognized his status as a native and citizen of Austria not subject to arrest as an enemy alien and that in fact and law defendant was a native and citizen of Austria.

"o. Defendant reasonably believed that his arrest,
175 detention, and forced transportation resulted from the public statements made concerning him by members of the House Committee on Un-American Activities, principally its Chairman, J. Parnell Thomas, (Rep. N. J.) and from a letter sent by the said J. Parnell Thomas to the Attorney General under date of January 31, 1947, and released to the press after defendant's arrest in which the said J. Parnell Thomas referred to the summoning of defendant to appear before the House Committee on Un-American Activities on February 6, 1947, asking that defendant 'be prohibited from department from the United States or disappearing or refusing to appear', stating that

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he was 'reliably informed' that defendant was taking such steps and asking that defendant be put 'under an immediate 24 hour surveillance in order to insure his appearance' before the House Committee on Un-American Activities.

"p. That the defendant had no intention whatsoever to depart before testifying before the House Committee on Un-American Activities in response to subpoena and before the Exit Permit which had previously been issued to him and cancelled would be reissued and that the defendant had no intention to 'disappear' or to refuse to 'appear' before the House Committee on Un-American Activities on February 6, 1947, and that allegations to that effect in the letter dated January 31, 1947, of Parnell Thomas to the Attorney General were wholly without foundation.

176 "q. Defendant believed that in appearing before the House Committee on Un-American Activities he could state any objections he had to proceeding of the Committee which he believed to be illegal and to any questions which he believed to be not pertinent to the subject matter under inquiry and that such objections to be timely, should be made before the contemplated Committee action or before answers were given to questions.

"r. Defendant's belief in respect to such objections were reasonably based on the advice of counsel and on his knowledge of proceedings generally.

"s. That after defendant's arrest on February 4, 1947, defendant had determined if forcibly brought before the House Committee on Un-American Activities to state his objections to the actions of the committee and J. Parnell Thomas which he believed led to his arrest and detention and the illegality of the proceeding which involved his transportation to Washington under guard, which prevented him from consulting counsel adequately and preparing adequately for his hearing, and to expose the real motive of the committee in causing him to be subpoenaed and arrested.

"t. In preparation for such objections the defendant h
prepared several drafts of a short statement and so
notes to assist him.

"u. That such drafts and notes were in his poss
177 sion and in his hand when he took the witness sta
before the House Committee on Un-American Acti
ties on February 6, 1947.

"v. That he was prepared to state his objections fr
these drafts and notes within the three minutes which
requested of the committee.

"w. That defendant did not intend, if time to state
objections had been allowed, to read before being sworn
long statement which he had previously prepared for
before the committee.

"x. That after being allowed three minutes for his
jections defendant—if the committee still demanded i
was ready to be sworn and to answer pertinent questi
put to him by the committee.

"y. That notwithstanding the illegality of his arr
transportation and appearance before the committee t
the defendant had no intention of making default wilful
otherwise on any obligation imposed upon him by Secti
192, of Title 2, U. S. Code.

"Fifth Offer of Proof

"The defendant contends as a defense to the indictm
that he was under no obligation to appear and testify
cause the Committee was abusing its power of subpoena
purposes beyond it power; this Court should not permit
processes and functions to be used in aid thereof, and
support of this contention the defendant offers to prove
following:

178 "a. That each of the members of the House Co
mittee on Un-American Activities and the Commit
as a whole did not call the defendant before its hearing
February 6th in aid of the legislative process or becau
the committee wished to obtain his testimony, but did,

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fact, call him before the said hearing for the following reasons:

"1. to harrass and punish him for his political beliefs,

"2. to prevent his departure from the United States and his return to Germany,

"3. to cause the persecution of the defendant by the Department of Justice for alleged perjury and other alleged crimes, and

"4. to intimidate the defendant and others.

"b. That in aid of the Committee's steps to hound and prosecute the defendant because of his political beliefs, the Chairman or other representative of the said Committee requested and arranged with the Attorney General and other representatives of the Department of Justice to have the defendant arrested and kept in custody.

"c. That the present proceeding is a result of this Committee's campaign to harass and persecute the defendant because of his political beliefs.

"d. That at no time was the Committee interested in obtaining any testimony from the defendant except in-
179 sofar as it might urge, on the basis of such testimony, the prosecution of the defendant for alleged perjury or alleged other crimes, or might in other ways harass and persecute the defendant."

* * * * * * * * * *

180 Mr. Hitz: Your Honor, may we come to the bench on the last request made by Mr. Isserman?

The Court: Yes, indeed.

(Counsel for both sides approached the bench, and the following occurred:)

Mr. Hitz: It is my understanding that the Court has ruled that he may refer to the papers that were brought by Eisler to the hearing. I assume that one of those papers will be the so-called 3-minute statement. In view of the contents of that statement, I wish to object to any reference being made to its contents.

The Court: Of course, I do not know what the contents of the statement are.

Mr. Hitz: I do.

The Court: Of course, my practice is not to acquire any knowledge of the pending case except what is offered in court. Now that this matter is brought up, I would be very glad to have you state what is in the 3-minute statement.

Mr. Hitz: I think it is fair to say, since the word has been used many times before, that it is some more Communistic propaganda largely devoted to attacking the Un-American Activities Committee.

181 The Court: I am going to exclude the statement, of course.

Mr. Hitz: The fact that he had—

Mr. Isserman: But that is only the District Attorney's statement.

The Court: If that summary is accurate.

Mr. Isserman: I would like to take issue with his statement and ask him the source of his information.

The Court: No; one counsel may not ask questions of another counsel. Do you deny that that is an accurate statement?

Mr. Isserman: I do deny that it is an accurate statement. Is the Court requesting me to state now what the statement contains?

The Court: I will be very glad to have you do so.

Mr. Isserman: Does the Court desire me to do so?

The Court: No. I will be glad to have you do so if you choose; I am not going to require you to do so.

Mr. Isserman: It is our position that whatever he tried to say in those three minutes goes purely to the question of his intention and wilfullness. I intend to summarize the statement before the jury.

The Court: Then, I shall not permit you to summarize it until you tell me, first, what is in it.

Mr. Isserman: In response to the Court's request—

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The Court: I made no request; I made a ruling
182 that I shall not permit you to summarize the statement until you tell me—

Mr. Isserman: Then, may I say in view of the Court's ruling I wish to say that the defendant, in the 3-minute period, did not have a written statement which he wanted to read, but he intended to make objections to being sworn in, based on what he believed to be his unlawful arrest, detention, and transportation to Washington, based on the fact that he believed that being in custody—as he termed it, a political prisoner, but in fact as an interned enemy alien—he was not required to be sworn, and that he was also going to state the political motivation which he believed was responsible for this illegal activity or activities, and that he believed that the chairman of the committee and the committee members had brought him down in this fashion for ulterior purposes.

The Court: Well, now, I am going to permit you to show everything up to what you call the political motivation. I think if what he wanted to do was to object to the legality of the proceedings, even though his method was ill-advised, I am going to allow it in as going to the issue of wilfullness. But when his statement goes to attacking the motives of the committee or its purposes, that I consider beyond the scope of the issues.

Mr. Isserman: I should like to call the Court's
183 attention to the fact that part of the illegality was what he deemed to be the abuse of process by the committee chairman.

The Court: I shall exclude that, because the courts have held, as I view the law, that an erroneous view of the law on the part of a witness, no matter how bona fide, does not excuse him.

Mr. Isserman: Of course, he was referring to matters of fact which applied to him, as far as the committee's treatment of him was concerned.

The Court: No. If good faith was an issue, I would admit it; but I regard good faith or bad faith as not an issue and

as not comprising the term willfulness. Therefore, I shall not admit it; but those earlier parts of the statement I shall admit, because I think they go to willfulness.

However, I am going to instruct the jury that even if he acted in good faith and under an erroneous view of his rights, that would be no defense if his action was deliberate and intentional, because willfulness I construe as a deliberate and intentional act, within the meaning of the statute, even if it is in good faith or through an erroneous view of the law.

Mr. Isserman: I understand there is no need to object to any of your Honor's rulings?

The Court: No. Under the Federal Rules of Criminal Procedure you do not have to note exceptions, just so long as you once indicate what it is on which you request
184 the Court to rule.

Mr. Hitz: I have one further thing to say on that. It is the position of the Government that even if his objection was going to be to the legality of the proceeding—which is what the Court has limited his statement to—that that—

The Court: When I say legality of the proceedings, I mean legality of the committee proceedings.

Mr. Hitz: Yes, as distinguished perhaps from the resolution or anything else—that that goes to the good faith rather than to the deliberate and intentional nature.

The Court: I think there is a great deal of merit in your position, but I think there is just enough doubt in that to warrant my construing the matter in favor of the defendant and admitting the evidence.

. . . . . .

186 Mr. Hitz: The fact is that Eisler never did make any claim as to the legality of the proceeding other than that he said he was a political prisoner, for what that is worth. Now we are about to go into something he intended to say, when the fact is he did not say it, nor did his counsel say it.

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Mr. Isserman: He was not allowed to say it.

Mr. Hitz: Presumably he was permitted to make his legal objections.

The Court: He said, "I want to make a 3-minute statement." If he had said, "I object to being sworn, and I want to note my objections," we would be confronted with a different situation. But I am not ruling on that
187 situation, because that is not here.

Mr. Isserman: If a layman states that he wants to make a few remarks before he is sworn, it would seem to me that in any procedure they would at least ask him and inquire the nature of the remarks he wanted to make.

The Court: The layman had counsel.

Mr. Isserman: Before a Congressional committee a lawyer is not allowed to talk.

Mr. Hitz: Finally, I think the statement does not amount to an objection; and since it does not, it is clearly beyond the matter of good faith—rather the matter of—

The Court: That may be so, but I think I will allow that narrow bit of evidence in, because I have some doubt about it; and I think in case of doubt I would rather let the defendant make his record.

Mr. Isserman: As I understand it, I may ask this question, because I want to remain within the Court's ruling to the maximum extent possible; that I may commence with his arrest on February 5?

The Court: Yes.

Mr. Isserman: And the events which brought him to Washington?

The Court: Yes, you may do that.

Mr. Isserman: His arrest on February 4. Or does your Honor mean I must commence with—

188 The Court: You may start with his arrest.

. . . . . .

(Counsel returned to the trial table, and the following occurred:)

Opening Statement on Behalf of the Defendant (Resumed).

Mr. Isserman: Under the instructions of the Court, my opening remarks on what we shall show will be considerably curtailed. I shall merely confine myself to these remarks, which the Court has permitted me to make.

The defendant in this case was arrested on February 4, 1947, under a Presidential warrant and under that warrant was interned as an enemy alien at Ellis Island.

On February 5, 1947, while in custody at Ellis Island, two officers, known as security officers of the Department of Immigration, came to the place of the defendant's detention and stated that he was to be taken to Washington. Late that afternoon he was taken by those two officers to Washington and that evening was put into the County Jail.

The next morning he was taken by the same two officers from the County Jail to an office of the Immigration
189 Service, and there he met his counsel, Mrs. King. He was allowed to confer with Mrs. King for only a few minutes and in the presence of one of the security officers of the Department of Immigration.

He was then taken to the hearing room of the Committee on Un-American Activities and was brought into that room by these two security officers of the Department of Immigration. He was under their custody throughout the proceedings which occurred in that room; and when the proceedings, insofar as they affected him personally, were over, he was taken from that room by the same two security officers of the Department of Immigration.

Now, the defendant after he received his subpoena on January 24, and of course before he was arrested, made certain preparations in connection with his coming down to Washington to testify. We will show that included in those preparations were, one, the preparation of a rather lengthy statement which he had been advised by his counsel he would be allowed to present to the committee.

We will show also that in addition to this preparation, he had reserved—made arrangements for the reservation

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of—hotel rooms in Washington, which reservations were completed, I believe, by February 3; and also on that date he had asked his wife, Mrs. Eisler, to purchase the railroad tickets which would take them to Washington. We
190 will offer into evidence in this case, the Court permitting, those railroad tickets bearing the date February 3.

He was all prepared, then, to go to Washington to appear before the committee on February 6.

Now, when he was arrested, and when he conferred with his counsel, he was advised by his counsel that his arrest and detention and transportation to Washington were against the law, and he was also advised that he could at the hearing, and before being sworn, object to what he believed was the unlawful arrest, detention, and transportation; and he was told also that if he did not object before he was sworn, he might lose any rights that he had.

When he was called to take the witness stand and he was asked to be sworn, he asked not for the right to read a lengthy statement—that is, the long statement which he had prepared before—but he asked for the right to make a few remarks, and in those remarks—and he will testify as to what he intended to say—he was going to say that his arrest and his detention and his transportation to Washington by guards were not in response to any subpoena at all but was an unlawful act or series of unlawful acts; that those unlawful acts were participated in and instigated by the chairman and by members of this Committee on Un-American Activities; and that, therefore, he was not appearing in response to a subpoena but because the committee had caused his arrest.

191 He desired to state those objections, and then he wanted to go further and explain the reasons for those objections; but I may not summarize those reasons here under an instruction from the Court. But the fact is that all he wanted was to be allowed three minutes to declare what his rights were and if the committee chair-

man would then have ruled against him and said, "We have heard your remarks, we have heard your objection" —as we lawyers would call it— "and we rule against your objection," then, after that passage of three minutes, the witness was ready and willing to answer questions that would be put to him and also to put into the record the long statement, about which there has been some discussion before you.

We will show, not only from his testimony but from the record which has already been, in part, read to you, that there was nothing willful about this defendant's actions, and that it would have taken a three-minute period to have cleared up the whole situation and to have allowed the committee chairman to ask him any questions which under the law they were allowed to ask and which under the law he would have been required to answer.

Now, it is our position that upon presentation of these facts to you, they will clearly indicate that there was nothing willful at all about the alleged refusal of this defendant to be sworn, as it is charged that he refused to be sworn, to testify.

192 **Arthur J. Brosnan**

* * * * * * * * * *

Direct Examination

By Mr. Isserman:

* * * * * * * * * *

Q. Mr. Brosnan, what is your occupation? A. I am employed by the United States Department of Justice as an Immigration and Naturalization security officer.

* * * * * * * * * *

193 Q. In your capacity as security officer for the Department of Immigration and Naturalization, were you given any instructions on or about February 5, 1947, in respect to one Gerhart Eisler? A. Yes, sir.

The Court: Mr. Isserman, are you trying to prove by this witness that the defendant was brought to the hearing

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in custody? I thought that fact was admitted by stipulation.

Mr. Isserman: I am trying to prove by this witness, and another witness, that this defendant was brought to the hearing in illegal custody, and I want to indicate the nature of the orders under which he was brought to the hearing room, the circumstances surrounding his being brought to the hearing room —

The Court: I am going to exclude that as being irrelevant. If you wish to protect the record in that respect, you may make an offer of proof as to what you expect to prove by this witness. Our usual custom or practice is to make offers of proof at the bench.

(Counsel for both sides approached the bench, and the following occurred:)

The Court: What do you expect to prove by this witness?

194 Mr. Isserman: If the Court please, does the offer of proof in this case have to be limited to this witness?

The Court: Yes.

Mr. Isserman: Just what we would prove by this witness?

The Court: Yes.

Mr. Isserman: We would prove by this witness, as part of our proof, that the defendant was unlawfully arrested on February 4, 1947.

The Court: Tell me what you offer to prove by this witness.

Mr. Isserman: That this witness had received instructions from a superior officer to bring the defendant to Washington, D. C., for this hearing, and that those instructions were the result of a letter sent on January 31, 1947, by J. Parnell Thomas, Chairman of the House Committee on Un-American Activities, to Attorney General Tom Clark.

The Court: I do not suppose you could prove that by this witness, could you?

Mr. Isserman: Well, I might be able to prove it by this witness. Further, we would prove by this witness the names of the superior officers under whom he received his instructions.

Mr. Hitz: I think that you are speaking a little loud.

The Court: Not so loud. The purpose of this is to make your offer of proof out of the hearing of the jury.

Mr. Isserman: The sources of those instructions;
195 and the final conclusion or final evidence that the defendant was transported to Washington, D. C., by this witness under no legal order whatsoever.

The Court: Do not argue; tell me what facts you have.

Mr. Isserman: That there was no order for his appearance in Washington, D. C., before the House Committee on Un-American Activities on February 6, 1947, and that the instructions the defendant had received he received as a result of a letter addressed to the Attorney General.

The Court: You have said that once before.

Mr. Isserman: I had not finished; I was interrupted before I had completed my statement as to that letter.

That as a result of the letter which Mr. Thomas had sent to the Attorney General, the defendant was arrested as an enemy alien and held for the purpose of bringing him to Washington before the Un-American Activities Committee on February 6.

The Court: As the Court understands it, there has been a stipulation to the effect that on or about February 4 the defendant was arrested and interned by the Immigration and Naturalization service as an enemy alien, and that he was brought before the committee in the custody of representatives of the Immigration and Naturalization Service. This being already in the record, any proof of those facts would be cumulative.

All of the other matters contained in the offer of
196 proof are irrelevant and will be excluded.

Mr. Isserman: May it please the Court, I do not recall that there was any stipulation in respect to the

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method of the defendant's arrest. I was under the impression from Mr. Hitz that he was to advise the Court on the method of arrest.

The Court: What was the stipulation made yesterday?

Mr. Isserman: Merely that he was in custody at the hearing.

The Court: I am sure that counsel will stipulate that.

Will you stipulate that, Mr. Hitz, if you have not already done so?

Mr. Hitz: That the custody was in the Immigration authorities both before and after the hearings.

The Court: Yes, pursuant to a warrant interning the defendant as an enemy alien.

Mr. Hitz: I will stipulate that except as to the word "interned." He did not become interned and never has been, but he was detained and held.

The Court: Detained.

Mr. Isserman: We cannot agree to the stipulation, because it is our understanding that he was interned.

The Court: No; "interned" is a legal conclusion. There was a period of detention before the interning. Anyway, that is a conclusion of law, and you cannot get it out
197 of this witness, I presume.

I am going to exclude all other matters except those that I stipulated.

Mr. Isserman: We will except.

The Court: Irrespective of whether we call it "detained" or "interned," he was in custody as an enemy alien.

Mr. Hitz: Immediately before and immediately after or at the time of departure from the hearing.

The Court: Well, I suppose he was in custody at the hearing.

Mr. Hitz: I am prepared to stipulate that he was in custody during the hearing as well.

Mr. Isserman: I accept that stipulation; but, of course, it does not preclude me from asking questions dealing with the witness on the morning of February 6?

The Court: Of course, any supplemental matter you may inquire into; but I will not permit you to offer cumulative evidence on the points already conceded.

Mr. Isserman: There will be no need of doing that if it is not in controversy.

The Court: But I shall exclude everything in the offer of proof for the reasons stated.

Mr. Hitz: I do not think the legality of the detention, insofar as this officer knows anything about it, is in
198 issue here. I think the ruling is that—

The Court: I am going to rule that the legality or illegality of the detention is irrelevant. The fact of the detention is already in the record.

Mr. Isserman: I still am under the duty to present every fact which we deem goes to the legality.

The Court: You may ask any questions you choose, and I shall rule on them.

Mr. Isserman: I understand.

(Counsel returned to the trial table, and the following occurred:)

The Court: Proceed.

By Mr. Isserman:

Q. Mr. Brosnan, when you took—Did you on February 4, 1947, take the defendant, Gerhart Eisler, into custody? A. That is right.

Q. Who was with you, if anyone, at that time? A. Security Officer Stephen Greenman.

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199 Q. When you took the defendant into custody, did you show him any paper of any kind?

The Court: I shall exclude that for the reasons stated at the bench.

By Mr. Isserman:

Q. What did you do with the defendant when you took him into custody? A. We left on the 4:30 train leaving

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Pennsylvania Station and arrived in Washington, and from there we took him to the Washington District Jail here.

Q. Did you stay with him after you took him to the Washington District Jail? A. We filed a detainer on the Presidential Order and left him in the custody of the District Jail here in Washington.

Q. When did you next see the defendant? A. Around 7:30 the following morning.

Q. What did you do with the defendant when you saw him that morning? A. From there we took him back to the Immigration station here in Washington, where we met Mrs. King, and then we proceeded—

Q. When you took him back to the Immigration station in Washington, what time of the morning was that?

200 A. Around 8:30.

Q. Was Mr. Greenman with you still? A. That is right.

Q. Did you meet Mrs. King at the Immigration station? A. Yes, we did.

Q. Did Mrs. King ask you for permission to speak to Mr. Eisler? A. Yes.

Q. Did you give that permission? A. It was not my authority to give that permission.

Mr. Isserman: May I get that answer?

(The last answer was read by the court reporter.)

By Mr. Isserman:

Q. Did Mrs. King speak to Mr. Eisler in your presence? A. Yes, she did.

Q. At all times that morning were you presence with Mr. Eisler wherever he was? A. Yes, I was.

Q. Was Mr. Greenman present with you and Mr. Eisler at every place and at all times that morning? A. Yes.

Q. When Mrs. King was talking to Mr. Eisler, you and Mr. Greenman were present, were you not? A. That is right.

Q. Was that conversation which Mrs. King had
201 with Mr. Eisler in a room in the office of the Department of Immigration? A. That is right.

Q. Was it a large room, Mr. —

The Court: What difference does it make whether it was a small or a large room?

Mr. Isserman: Well, if the Court please, it may make a difference.

The Court: Let us not go into these minutiae. I am going to exclude that question.

Mr. Isserman: May I state—The Court has already ruled?

The Court: Very well; state what difference it makes whether the room was large or small.

Mr. Isserman: It will show the lack of privacy Mrs. King had in talking to Mr. Eisler. If that will be stipulated, we will not need to ask him about it.

The Court: Well, is there any dispute over the fact that the conference between Mrs. King and the defendant was conducted in the presence of representatives of the Immigration Service?

Mr. Hitz: I have no knowledge of it, nor of the room it was in. I do not know.

The Court: I do not think it makes any difference what room it was in.

Mr. Isserman: I did not ask what room; I asked for the size of the room. Perhaps I can put the question differently.

202 The Court: Let him answer the question; it will save time.

The Witness: I don't know the size of the room.

By Mr. Isserman:

Q. But you were pretty close to Mr. Eisler during this whole period, were you not? A. About 8 feet away.

Q. Mr. Greenman was about the same distance away? A. That is right.

Q. How long did Mrs. King stay with Mr. Eisler? A. I would say about an hour.

Q. In that entire period, you were there too? A. That is right.

Q. And so was Mr. Greenman. Now, after Mrs. King left, what did you do with Mr. Eisler? A. We escorted him back to the Committee on Un-American Activities.

Q. You took him to the hearing of the Committee on Un-American Activities, did you not? A. That is right.

Q. In the entire time he was at the hearing, he was in your custody, was he not? A. That is right.

Q. Now, in the course of the hour which Mrs. King spent with Mr. Eisler, didn't you spend a good deal of that
203 hour with Mr. Eisler in taking him where he could be washed up and put in presentable condition for the hearing? A. That is right.

Q. That was a substantial part of the hour, was it not? A. I would say about 15 minutes of it.

Q. And Mrs. King was not there at that time? A. That is right.

Q. Is that correct? A. That is right.

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Steve Greenman

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207 Cross-Examination

By Mr. Hitz:

Q. Is your answer that you don't remember what you heard said between Mrs. King and Eisler, or that you don't remember whether you heard anything? A. I know they were talking. I could hear them talking, but I just couldn't remember the words that were spoken.

Q. Did you hear the words at that time? A. No, sir.

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209 **Reginald Parker**

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Direct Examination

By Mr. Isserman:

* * * * * * * * * * *

Q. What is your occupation, Mr. Parker? A. I am assistant—associate professor of law in the Columbus University, of Washington, D. C.

Q. What subjects of law do you teach there? A.
210 I might say the general common law subjects I have been teaching so far there, like torts, contracts, wills, equity—

The Court: I do not think we need to go into those details.

By Mr. Isserman:

Q. Have you any information in a professional sense as to the law of Germany and the law of Austria pertaining to nationality? A. Yes, by all means, sir. I may add why.

The Court: No, it is not necessary.

Mr. Isserman: Unless the qualifications are admitted, I should like to ask the witness to state his qualifications as an expert in German and Austrian law, particularly on the law of nationality.

The Court: Is there any question about his qualifications?

Mr. Hitz: I have never seen this gentleman before. I do not know of his reputation; I am sure it is good.

The Court: Very well.

By Mr. Isserman:

Q. Will you please state your qualifications as an expert on the German and Austrian law of nationality? A. I will be very brief. I want to say despite the fact I was born in New York I spent most of my life in Vienna and practiced law there for about 8 years. Nationality cases were

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211 frequent, involving Germans, Austrians, Czechoslovaks, and so forth, and many of them came to my attention and professional care; and I am also now—in this country I have always tried to be professionally specialized in international law, but it has time and again led me into questions of nationality, foreign and American.

Q. What is the German law of—

Mr. Isserman: I withdraw that question.

By Mr. Isserman:

Q. Mr. Parker, are you familiar with the state of the law of nationality in Germany? A. Yes, sir.

Q. Particularly with reference to the year 1897? A. 1897? Yes.

Q. Under the German law of nationality in that year, what was the nationality of a person born in Germany of parents who were Austrians?

The Court: I should like to know what the relevancy of that question is to the issues of this case. Tell me in a sentence or two what is the relevancy of this.

Mr. Isserman: The relevancy of this is to show that the defendant's arrest on February 4, 1947, under an alleged Presidential warrant as an enemy alien was unlawful, in that the defendant never was an enemy alien.

The Court: The testimony will be excluded as ir-
212 relevant to the issues of this proceeding.

Mr. Isserman: I should like at this time to make the following offer of proof.

Mr. Hitz: Which one of your offers is it?

Mr. Isserman: That is item E in my third offer.

The Court: The offer of proof must be limited to what you expect to elicit by this question.

Mr. Isserman: That is what I expect to do.

The Court: Very well.

Mr. Isserman: That under the law of both Germany and Austria the defendant was a native of Austria and not a native of Germany.

The Court: The question will be excluded.

. . . . . .

Mr. Isserman: Just a minute, please. And also, if the Court please, the further fact that the defendant was a citizen of Austria, not a citizen of Germany.

The Court: That also will be excluded.

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213 **James M. McInerney**

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Direct Examination

By Mr. Isserman:

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Q. Mr. McInerney, what is your occupation? A. I am First Assistant in the Criminal Division in the Department of Justice.

. . . . . .

215 Q. Mr. McInerney, do you have with you a copy of the communication, I mean the original communication sent by J. Parnell Thomas to the Attorney General dated January 31, 1947, relating to the surveillance of Gerhart Eisler and his appearance before the House Committee on Un-American Activities on February 6, 1947?

216 A. I do, sir (witness produces document).

Q. And this letter was officially received by the Attorney General? A. That is correct.

Mr. Isserman: At this time I would like to offer as exhibit on behalf of the defendant a letter signed by J. Parnell Thomas, Chairman of the Committee on Un-American Activities dated—

Mr. Hitz: You are not going to read it, are you?

Mr. Isserman: Dated January 31, 1947, addressed to Honorable Tom C. Clark, Attorney General, Department of Justice, Washington, D. C.

The Court: Have you seen it?

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Mr. Hitz: I know the contents of the letter and I object to it as not material to the case.

The Court: The objection is sustained. The letter is irrelevant to any of the issues in this case.

Mr. Isserman: May the letter be marked for identification?

The Court: Oh, yes.

(Letter dated January 31, 1947, from J. Parnell Thomas, Chairman, to the Attorney General of the United States was marked Defendant's Exhibit No. 1 for Identification.)

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217 Q. Mr. McInerney, do you have with you the Presidential warrant of arrest dated February 4, 1947, signed by the Attorney General for the arrest of Gerhart Eisler as an enemy alien? A. I believe that is included among the documents which Mr. Rothstein is bringing over.

The Court: Now, I may state to save time that I do not consider that relevant because the fact of the arrest is stipulated in the record and, therefore, it would be purely cumulative to offer the warrant.

Mr. Isserman: We believe the terms of the warrant are important.

The Court: Why?

Mr. Isserman: Because they indicate that the defendant was arrested as an enemy alien.

The Court: I think that is admitted. I understand

218 Mr. Hitz admitted that the defendant was taken into custody as an enemy alien. Is that correct?

Mr. Hitz: That is correct.

The Court: So you do not need the Presidential warrant.

By Mr. Isserman:

Q. Do you have with you, Mr. McInerney, the record, or records, of service of said warrant showing the time and place served, and by whom? A. No, sir, I do not.

The Court: I am going to exclude that for the same reason.

Mr. Isserman: If Your Honor please, we would like to make an offer of proof in respect to that, and other information we are asking of this witness.

The Court: The fact that the defendant was arrested pursuant to a warrant as an enemy alien, and was taken into custody on that ground is admitted in this case. Now, what else do you want to bring along that line? I am going to exclude any evidence which you tender which in any way questions the legality of the arrest, because that is not in issue in this case.

Mr. Isserman: If Your Honor rules it out on the second ground, I would like to state to Your Honor the reason why we think it is relevant.

The Court: Why?

219 Mr. Isserman: We intend to show that at the time of the arrest of Mr. Eisler he was not served with any warrant whatsoever, and the time and place of the service of the warrant and the record which the Attorney General has to that effect.

The Court: I am not interested in that. I will exclude it. The fact of the arrest is admitted. How the arrest was accomplished is immaterial, and whether it was legal or illegal is also immaterial. Bear in mind the only issue—Mr. Isserman, I am calling your attention—bear in mind that the only issue in this case is whether the defendant was guilty of default during his appearance before the Committee, and whether that default was wilful, and everything else is extraneous.

Mr. Isserman: If the Court please, we understand that is the Court's ruling, but we would like to make an offer of proof of other matters we deem material.

The Court: Proceed; but in order to make the record, Mr. Isserman, on matters the Court has excluded you do not have to offer cumulative testimony.

Mr. Isserman: As to that feature of the testimony I would like to approach the bench and indicate to Your Honor what we intend to prove under these defenses, and if Your Honor will rule—

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The Court: Oh, no, I won't let you do that. I will
220 rule on questions of evidence as we go along.

Mr. Isserman: That is what we are endeavoring to do.

The Court: I have already ruled on the Presidential warrant. I have excluded that, and the manner of the arrest, and whether the warrant was or was not served.

By Mr. Isserman:

Q. Now, Mr. McInerney, I ask you if you have with you documents and reports showing, or from which it can be ascertained, the number of names of any and all enemy aliens arrested on and after January 1, 1947, to date as "dangerous to public peace and safety of the public peace" pursuant to Presidential Proclamation No. 2526 dated December 8, 1941? A. I understand there were none except Mr. Eisler.

Q. Mr. McInerney, I ask you whether you have with you copies of instructions issued by the Attorney General, or his subordinate, with reference to the entrance, deportation and treatment of enemy aliens issued subsequent to July 20, 1945? A. I do not, sir. That is included among the material Mr. Rothstein is producing.

Q. I will ask you if you have in your possession record of the order of release of Mr. Eisler obtained on Presidential warrant dated on or about April 15, 1947? A. I didn't hear the first.

Q. I am sorry, the order of release from custody of Gerhart Eisler as an enemy alien detained on Presi-
221 dential warrant dated on or about April 15, 1947?

Mr. Hitz: The question is do you have such an order?

The Witness: I have such an order, yes.

Mr. Isserman: May I see it, please?

(Witness produces document.)

Mr. Isserman: May I have the telegram dated April 12, 1947, addressed to the Honorable John F. McGohey, United States attorney, U. S. Court House, New York, signed—

The Court: Don't go into all those details.

Mr. Isserman: I want to identify the telegram.

The Court: Just identify it briefly.

Mr. Isserman: I am going to give the—

The Court: Don't tell me that, just identify it briefly.

Mr. Isserman: I am trying to do as Your Honor tells me.

The Court: The Court has the last word.

Mr. Isserman: I shall complete the identification by indicating that it is signed by Tom C. Clark, Attorney General.

The Court: Are you offering it in evidence?

Mr. Isserman: I now offer Defendant's Exhibit No. 2, for identification, in evidence.

(Telegram dated April 12, 1947, to John F. McGohey was marked Defendant's Exhibit No. 2 for Identification.)

Mr. Hitz: I object to it.

The Court: Objection sustained.

222 Mr. Isserman: I would like to make an offer of proof, if Your Honor please.

The Court: You don't need to make an offer of proof when it is marked for identification; that protects the record. Proceed.

Mr. Isserman: May I see the exhibit, please?

The Court: I beg your pardon, ask the next question.

Mr. Isserman: I want to examine the exhibit for a minute, if I may.

By Mr. Isserman:

Q. Mr. McInerney, I now ask you if you have with you all applications to extend time of temporary stay on Form I-5390639 executed by Gerhart Eisler between August 6, 1941, to the present date, returned by him to the Immigration and Naturalization Service, which are in File No. 56088411? A. I have, sir.

Q. May I examine it, please? A. I will have to remove them from the file.

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Q. Will you do that, Mr. McInerney, please?

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223 Q. Mr. McInerney, do you have with you now the documents I requested just before the recess? A. I do.

Q. May I have them, please? A. (Witness produces papers.)

Mr. Isserman: At this time I would like to mark for identification as Defendant's Exhibit No. 3, Form I-539, United States Department of Justice, Immigra-
224 tion and Naturalization Service, entitled "Application to Extend Time of Temporary Stay," District No. 9—

The Court: You don't have to identify all that.

Mr. Isserman: There is a great deal of it.

The Court: The exhibit number will be sufficient for identification.

Mr. Isserman: But there are many with the same exhibit number—oh, I see.

The Court: I mean the Clerk's exhibit number will be sufficient.

Mr. Isserman: Correct. I think the date should be mentioned, if Your Honor please.

The Court: The exhibit number is sufficient.

(Form I-539 of the Immigration and Naturalization Service was marked Defendant's Exhibit No. 3 for Identification.)

Mr. Isserman: I would like now to offer—

The Court: Just a minute, I have not approved it.

Mr. Isserman: I thought I would mark a series of these for identification.

The Court: No; are you offering this?

Mr. Isserman: I am offering Defendant's Exhibit 3 for identification in evidence.

The Court: Does the Government wish to be heard?

Mr. Hitz: I object as irrelevant.

The Court: Objection sustained. This exhibit is
225 irrelevant to any relevant issue in this case.

Now, then, have you any more of these papers you wish to offer?

Mr. Isserman: I have more of these papers bearing on different dates and containing other items of information which we deem material and relevant to the issues in this case.

The Court: How many of them are there?

Mr. Isserman: There are six, Your Honor.

The Court: They are all excluded and they will be marked consecutively as Defendant's Exhibit 4 for identification, and so on, and the Clerk can mark them at his convenience and in the meantime you may proceed.

(Documents from the Immigration and Naturalization Service were marked Defendant's Exhibits 4, 5, and 6, for Identification, respectively.)

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226 Q. Now, Mr. McInerney, you are familiar with the status which Mr. Gerhard Eisler had when he came to the United States in June of 1941? A. I am, sir.

Q. And what status did he come in under?

Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: May I make an offer of proof, if Your Honor please?

227 The Court: You may make an offer of proof.

Mr. Isserman: I offer to prove that the defendant came to the United States—

Mr. Hitz: May I interrupt a moment? If it is to be an oral offer of proof I suggest it be made at the bench.

The Court: No, just state briefly what the answer is expected to be.

Mr. Isserman: I would like to make an offer of proof if I may.

The Court: The way to make an offer of proof with the witness on the stand is "I offer to prove that the witness' answer would be so and so."

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Mr. Isserman: That is what I want to do.

The Court: Well, you may.

Mr. Isserman: I would like to offer to prove that this witness, if permitted to answer, would testify that the defendant Gerhart Eisler arrived in this country in June, 1941, as an alien in transit to Mexico.

The Court: Very well, that is excluded as immaterial and irrelevant.

By Mr. Isserman:

Q. Mr. McInerney, I now ask you whether or not Defendant Gerhart Eisler from his arrival in the United States in June, 1941, applied for any change of status from his status as to being here on a transit visa, up to
228 and including February 4, 1947?

Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: I offer to prove that this witness, if allowed to answer, would state that the defendant Gerhart Eisler never applied for change in status.

The Court: Well, you mean you expect him to say no. That is the offer of proof.

Mr. Isserman: No.

The Court: Because your question calls for a yes or no answer.

Mr. Isserman: May I have the question read, please?

The Court: No, you may proceed.

Mr. Isserman: Well, Your Honor, I would like to—

The Court: You ought to know how to make an offer of proof.

Mr. Isserman: I am asking the stenographer to tell me what I asked. I want to make sure the defendant's point is covered.

The Court: You may do it this time but don't do it again. You ought to know your own question.

Mr. Isserman: May I object to the Court's remark? I think it is improper and I ask that it be stricken out.

The Court: The Court never strikes its own remarks. You may object to the Court's remarks, but the
229 Court never strikes its own remarks.

Mr. Isserman: I ask to have the Court's remark eliminated from the record.

Would you read the question?

(Pending question read by the reporter.)

The Court: You see, that calls for a yes or no answer.

Mr. Isserman: No, it doesn't, it calls for it in the alternative, and I would like to state an offer to prove.

The Court: State it.

Mr. Isserman: I offer to prove that this witness, if allowed to answer, would answer that the defendant, Gerhart Eisler, did not apply for a change in status from the status of an alien in transit to Mexico from the time of his entry in the United States in June, 1941, up to and including February 6, 1947.

The Court: I still say the question calls for a yes or no answer. I think you are wasting time unnecessarily and I sustain the objection.

Mr. Isserman: I am constrained to enter another objection to Your Honor's statement.

The Court: Very well, you have the privilege of doing so.

By Mr. Isserman:

Q. I ask you, Mr. McInerney, whether it isn't a fact that from and after June 14, 1941, until May 8, 1945, that
230 the defendant was a continuous applicant to governmental authority for permission to leave for Mexico to carry out his intention which he had when he entered the United States?

Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: I offer to prove, Your Honor, that this witness would answer this question in the affirmative.

The Court: Very well.

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By Mr. Isserman:

Q. Now, I ask you, Mr. McInerney, whether or not it is not a fact that from and after the termination of hostilities between the United States and Germany in May, 1945, that the defendant Gerhart Eisler continuously applied for an exit permit authorizing his departure from the United States?

Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: I would like to offer to prove, Your Honor, if this witness were permitted to answer he would answer this question in the affirmative.

The Court: Very well.

By Mr. Isserman:

Q. I now ask you, Mr. McInerney, whether or not it is a fact that the applications of the defendant between June 14, 1941, to May, 1945, to be permitted to leave for Mexico were denied?

231 Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: I would like to offer to prove, Your Honor, that this defendant, if he were permitted to answer this question would answer in the affirmative.

The Witness: You mean witness.

Mr. Isserman: I am sorry, I had the defendant on my mind.

By Mr. Isserman:

Q. I now ask you, Mr. McInerney, if it is not a fact that the defendant's application for permission to depart from the United States from and after the cessation of hostilities between the U nited States and Germany were, in fact,

Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: I offer to prove, Your Honor, that if this witness were permitted to answer he would answer in the affirmative.

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Mr. Hitz: I have two things to take up with the Court. The first is the question which was asked by Mr.
232 Isserman, which I think was the first question asked of this witness, which I believe the reporter can read to us. I want to move to strike the answer that was given because the question called for an answer that Mr. McInerney bring with him certain papers, or have certain information, and instead of saying he did bring that, or had the information with respect to the arrest of aliens, he said no, and I would like to move that the answer be stricken out.

The Court: What was the answer, can you tell me briefly?

Mr. Hitz: It was with respect as to whether any other aliens were arrested after that date in 1947, and the answer would be zero.

The Court: I will strike it.

Mr. Hitz: The answer will be stricken out as irrelevant?

The Court: Yes.

Mr. Hitz: Also, inasmuch as this was in the presence of the jury, the fact that Mr. Isserman stated he would elicit certain information from the witness if he were permitted to answer does not mean that he would give those answers.

The Court: Oh, no, that means only that is the answer he hopes to get.

Mr. Hitz: Yes, sir.

The Court: The reason I did not want counsel to come to the bench, of course that is our practice, but I did not want counsel to be going back and forth to the bench
233 and the counsel table for each question because I did not think it was such that would elicit prejudicial information.

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Hon. John Parnell Thomas

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Further Cross Examination

By Mr. Isserman:

Q. Mr. Thomas, you have been requested to bring to Court with you any communication received by you from the Attorney General of the United States in answer to a letter sent by you to the Attorney General dated January 31, 1947, relating to the surveillance of Gerhart Eisler, and I ask you whether you have such a communication with you? A. I have not.

Q. Did you receive any such communication? A. I did not.

234 Mr. Hitz: I object, and I move that the answer be stricken, Your Honor.

The Court: I think it is innocuous.

Mr. Hitz: I think it is. I just wanted to preserve the continuity of the Government's objections here, whether it was innocuous or not.

By Mr. Isserman:

Q. Did you have any conference or telephonic communication between the Attorney General or any of his representatives between January 31, 1947, and February 4, 1947? A. I did, but—

Mr. Hitz: Just a minute, please, I think that answers the question, because I want to interpose an objection if the substance—

By Mr. Isserman:

Q. In these telephonic conversations—withdraw that.

Were those conversations by telephone or by contact? A. There was one telephone conversation from me to one of the officers in the Attorneyy General's office.

Q. And with which official did you have that conversation? A. Mr. Caudle.

Q. And when did you make that telephone call? A. Some time very soon after January 31st; it may have been on January 31st.

235 Q. And that telephone call dealt with the appearance of Gerhart Eisler before your Committee on February 4?

Mr. Hitz: Don't answer that.

By Mr. Isserman:

Q. Or on February 6, 1947, did it not?

Mr. Hitz: Please don't answer. I think now we have identified the telephone conversation sufficiently, and I object.

The Court: Objection sustained.

Mr. Isserman: May I approach the bench, Your Honor?

The Court: I want to make progress.

Mr. Isserman: I do, too, but I have a series of questions, and if the objections would go to all of them it would save time.

The Court: Very well.

(Counsel for both sides approached the bench, and the following occurred:)

The Court: Have you a list of the questions written out?

Mr. Isserman: It is more or less mixed up. I will state it orally. The defendant offers to prove that this witness, by telephone conversation and other communications with the Department of Justice procured the arrest of Gerhart Eisler on February 4, 1947, by the Attorney General of the United States on Presidential warrant, and that said

236 arrest was arranged for in order to make certain the appearance of the defendant Gerhart Eisler in custody before the House Committee on Un-American Activities on February 6, 1947.

The Court: I will exclude that. I may say that you have already covered that by that letter from Mr. Thomas.

Mr. Isserman: That doesn't quite answer it.

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The Court: Very well, I am going to exclude it. It is irrelevant to any issue in this case.

(Counsel returned to the trial table, and the following occurred:)

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237 Q. Mr. Thomas, before you sent the letter which is marked Defendant's Exhibit No. 1 for identification to the Attorney General, did you have a conference with members of the House Committee on Un-American Activities relating to the surveillance and arrest of Gerhart Eisler?

Mr. Hitz: Please don't answer that. I object.

The Court: Objection sustained. Now, I am going to sustain the objection to this entire line of examination. I think you have protected the record by asking the question, and I am going to rule that the reasons for the apprehension of the defendant, and what led up to his arrest, are all matters that are immaterial.

Mr. Isserman: In connection with the Court's ruling, I would like to approach the bench and make an offer of proof of facts.

The Court: No, you cannot do that because you don't know what this witness will testify to. You can only make an offer of proof if you know what this witness will testify.

Mr. Isserman: If I may state what I except the witness to testify, as you said a while ago.

The Court: Yes.

238 (Counsel for both sides approached the bench, and the following occurred:)

The Court: Make it brief and skeletonize it as much as possible.

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Mr. Isserman: The answers we expect from this line of questions from the witness which we offer to prove, are the following: that this witness, together with other members of the Committee, determined to subpoena Gerhart Eisler

merely because Gerhart Eisler was a German Communist, and for no other purpose within the scope of the Committee's power; that they determined to procure his arrest with the intention of bringing him in custody before the Committee to harass and punish him for his political beliefs, and not to elicit any information upon a matter under inquiry committed to them by Congress.

Mr. Hitz: The Government objects to that.

The Court: I am going to exclude that, however,
239 the Court wishes to make this observation, that the Court does not believe that the witness would have testified as stated in that offer of proof; however, even if he did I would exclude the matter.

Mr. Isserman: In order not to come back again I would like to offer proof further with this witness that the purpose of bringing him before the Committee was to prevent his departure from the United States and his return to Germany. My reference, is, of course, to the defendant Eisler. That is all I offer to prove by this witness.

Mr. Hitz: I object.

The Court: I will exclude that.

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247 Mr. Isserman: • • •

There is one matter to which our client has called our attention, to which I think I should call the Court's attention. He has complained that much of this trial is being held at bench conferences, which he does not hear
248 and about which he is not informed. He pointed out that this trial is unusual in that respect.

The Court: It is not unusual.

Mr. Isserman: I mean in the number of bench conferences.

The Court: No.

Mr. Isserman: But he would like to be present at the bench conferences which affect his rights.

The Court: No.

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Mr. Isserman: May I move to have him present, or move to have the conferences not as bench conferences?

The Court: Yes; I will permit you not to have them as bench conferences. However, bench conferences are intended for the protection of defendants' rights. We have bench conferences so that the jury should not be prejudiced by reason of rulings of the Court. I shall make all rulings hereafter in open court if you prefer, and you may make all motions in open court. It is our practice in this jurisdiction to have counsel make a motion for a directed verdict at the bench, so that the jury may not be prejudiced by the fact that such a motion was made for the defendant.

Mr. Isserman: Is not the jury sometimes excused?

The Court: We do not excuse the jury except for lengthy arguments, because if every time a ruling came up and we had to wait for the jury to go out and then come in, the length of time that would be taken for trial would be interminable.

249 Mr. Isserman: He says he would like to know what goes on, and we cannot tell him when we return, because we are proceeding with the trial.

The Court: If you do not want to protect your client's rights by having conferences at the bench, you may move to bring them up in open court—that is, so far as you are concerned. If Mr. Hitz has anything he wishes to bring up at the bench, they may be taken up at the bench.

Mr. Isserman: I am just following the suggestion of my client.

The Court: I do not care at whose suggestion it is. Bench conferences are intended to be for the protection of the defendant; but if the defendant does not want that protection, he will not have it.

Mr. Hitz: In the same connection, about the defendant's being informed about what has taken place so far, I am asking to have it appear in the record that counsel is getting a daily copy of the record, and I would like to have counsel state what time the following day he receives his

copy. I think it might be well, to complete the record, to have that information.

The Court: Well, the reporter can place that in the record, because the reporter knows when delivery was made.

(The reporter makes the following notation: The record for Wednesday, June 5, 1947, was delivered to Mr.
250 Rein, who called at the reporter's office about 9:45 p.m. and received the record when it was finished. The transcript for Thursday, June 6, 1947, was placed in the mail by the reporter about 10:10 p.m.)

The Court: I want to say this: I will not permit offers of proof to be made except at the bench. I make that qualification to my ruling. There are some offers of proof that I would not permit to be made in open court.

Mr. Isserman: In that case, we would ask that the defendant be allowed to approach the bench.

The Court: No, I deny that. It is not the practice of the Court to allow litigants to come to the bench. Only members of the bar and court officers are allowed to come to the bench.

Mr. Isserman: In this particular case—

The Court: I am not interested in why you make this request. You have a right to make it, and it is denied.

(Counsel returned to the trial table, and the following occurred:)

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266 Mr. Isserman: At this time we should like to ask the Court, on behalf of the defendant, to take judicial notice of the statements made on the floor of the House of Representatives and reported in the Congressional Record on February 18, 1947, of members of the House Committee on Un-American Activities in connection with the resolution which they had presented to the floor of Congress to cite the defendant in this case for contempt.

The Court: I decline to do so, because that is not a proper matter for the judicial notice of the Court.

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Mr. Isserman: May I state an offer of proof in respect to that?

The Court: No; you may not make an offer of proof as to the judicial notice. I decline to take judicial notice. You may identify these matters and hand them to the reporter.

Mr. Isserman: I should like to identify the matters as statements made by Representatives Nixon, Thomas, Rankin, Bonner, Mundt, and Vail, contained in the Congressional Record for February 18, 1947, at pages 1178 to 1187.

Mr. Hitz: The Government objects.

267 Mr. Isserman: I ask that these statements be put into the record.

The Court: The Government objects, and I decline to take judicial notice of them.

Mr. Isserman: At this time—

The Court: Counsel must rise when addressing the Court. You may examine witnesses while sitting down.

Mr. Isserman: The Court is correct. I was in error in sitting down.

(The statements of Representatives Nixon, Thomas, Rankin, Bonner, Mundt, and Vail, just referred to by Mr. Isserman, are identified as appearing at pages 1178-1187 of the Congressional Record for February 18, 1947.)

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268 **Robert E. Stripling**

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Direct Examination

By Mr. Isserman:

Q. Mr. Stripling, how long have you been secretary of the House Committee on Un-American Activities? A. I was the secretary and chief investigator of the Special Committee on Un-American Activities from 1938 until January 3, 1945, at which time I entered the Army. I returned with the standing Committee on Un-American Activities on January 22, 1947.

Q. In the course of your experience as secretary of the committee, you have attended a great many sessions of the committee, have you not? A. I have.

Q. Have you made yourself familiar with the procedure of the committee from January, 1945, to January,
269 1947, when you were not secretary of it? Are you familiar with the procedure then? A. I am not.

Q. Now, in the course of your being secretary for the committee—

Mr. Isserman: I withdraw that.

By Mr. Isserman:

Q. For how many years were you secretary of the House Committee on Un-American Activities?

The Court: He has already answered the question.

Mr. Isserman: I would like to get the number of years, your Honor.

The Witness: Do you mean the House Committee on Un-American Activities or the Special Committee?

By Mr. Isserman:

Q. The first House Committee, which preceded the present standing committee. A. Well, the Special Committee on Un-American Activities—I was with it from 1938 until January 3, 1945.

Q. Now, in the course of your experience with that committee, had you become familiar with the procedure of the committee with respect to witnesses, Mr. Stripling? A. Yes.

Q. Has it been customary on all occasions to allow counsel to be present when a witness is called?

270 Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: I should like to make an offer of proof.

The Court: No; I exclude this as irrelevant; therefore, an offer is not necessary.

Mr. Isserman: I should like to state—

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The Court: No. Proceed with the next question. I do not think an offer of proof is necessary unless the admissibility of the testimony depends upon the nature of the answer. But when a subject matter is irrelevant, I do not think counsel needs the protection of an offer of proof.

Mr. Isserman: The offer would indicate relevancy.

By Mr. Isserman:

Q. Now, Mr. Stripling, you have been present before the House Committee on Un-American Activities on occasions when witnesses were attended by counsel? A. I have.

Q. From your experience with the committee and from your observations, you have knowledge of the practice of that committee in respect to the permission given to counsel—in respect to a witness who comes with counsel? A. I have.

The Court: I think that this is irrelevant, Mr. Isserman. What was done in this particular case is, of course, relevant and admissible; but what was done in other cases is not.

271 Mr. Isserman: If the Court please, I am trying to establish a practice of the committee in respect to its procedure.

The Court: My ruling is that the practice is not relevant. The question is what was done in this case, and not what was the general practice.

Mr. Isserman: I would like to make an offer at this time to show through this witness that the practice of the committee when counsel was present with a witness before the committee was to allow the witness to speak; but counsel only to confer with the witness.

The Court: I am going to rule that out as irrelevant on the ground that the only matter that concerns us here is what was done in this case, not what might have been done in other cases.

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273 **Charles M. Rothstein**

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Direct Examination

By Mr. Isserman:

Q. May we have your full name, please? A. Charles M. Rothstein.

Q. What is your occupation, Mr. Rothstein? A. I am acting director of the Alien Enemy Control Unit, Department of Justice.

Q. Is that the unit of the Department of Justice which has the supervision and control over enemy aliens arrested under Presidential warrants? A. It is.

Q. Will you state whether or not there is any regulation or authorization in the Department of Justice, particularly in the Alien Enemy Control Unit, permitting the
274 transportation of any person held in custody under Presidential Proclamation 2526, which has been promulgated or issued, except for transportation of such persons for purposes of detention, removal, or release?

Mr. Hitz: I object to the question as irrelevant.

The Court: The objection is sustained on the ground that the subject matter of the question is irrelevant to any issues in this case.

Mr. Isserman: If this witness were permitted—

The Court: No; I will not let you make an offer of proof, because that is not necessary. I rule out this subject matter as irrelevant. I will not let you make an offer of proof in open court.

By Mr. Isserman:

Q. Now, Mr. Rothstein, would you tell us whether or not as a matter of practice prior to the transportation of the defendant Eisler any person in custody under Proclamation 2526 has ever been involuntarily transported except for purposes of detention or removal from the United States.

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Mr. Hitz: I object; same ground.

The Court: Objection sustained.

Mr. Isserman: May I make an offer of proof?

The Court: No; and you may not make an offer of proof in open court. Moreover, I do not think an offer of proof is necessary when a subject matter is excluded as irrel-
275 evant. An offer of proof is necessary to protect a litigant's right when the admissibility of the evidence depends on the nature of the answer. But when the entire subject matter is irrelevant, you do not need an offer of proof. But under any circumstances we would hear offers of proof at the bench, and not in open court.

Proceed.

Mr. Isserman: In respect to the last two questions, in view of your Honor's statement, I should like to approach the bench and make an offer of proof in respect to each of them.

The Court: No; in the light of the statement made by defense counsel, I will not allow that. You stated at the last bench conference that you preferred everything done in open court; that your client objected to having things done at the bench that he could not hear. I informed you that the only purpose of a bench conference is to protect the defendant. Now, you may not change back and forth.

Mr. Isserman: I am not trying to change, if your Honor please, but I believe an offer of proof is necessary in this case, and if we cannot make it in open court, we should like to make it at the bench, although I believe—

The Court: Proceed with the next question. In my opinion, an offer of proof is not necessary to protect the defendant's rights when a line of inquiry is excluded as irrelevant. An offer of proof is necessary when the
276 admissibility of testimony depends on the nature of the answer.

By Mr. Isserman:

Q. Mr. Rothstein, will you tell us whether or not persons in custody under Presidential Proclamation 2526 were ac-

corded the rights guaranteed to prisoners of war by the Geneva Convention?

Mr. Hitz: I object.

The Court: Objection sustained, because that is a question of law, as well as because the subject matter of the question is irrelevant.

Mr. Isserman: Could I make an offer of proof in respect to this question? I offer to prove—

The Court: No, I will not let you make an offer of proof. I have told you that I consider this subject matter irrelevant. I might add another reason: What was done in the case of other persons is not relevant here.

Mr. Isserman: My question is directed to the practice of the Alien Enemy Control Unit.

The Court: The practice is not binding on this Court.

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277 **Brunhilda Eisler**

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Direct Examination

By Mr. Isserman:

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Q. You are the wife of the defendant in this case, Mr. Gerhart Eisler? A. Yes, I am.

Q. On or about January 24, 1947, were you present when your husband was subpoenaed to appear before the House Committee on Un-American Activities on February 6, 1947?

A. I was.

278 Q. Subsequent to that day, did you assist your husband in making any preparations for the hearing on February 6, 1947? A. Yes, I did.

Q. Will you tell us what you did? A. I typed the statement and I cut the stencils for the statement that my husband—in which my husband wanted to state his case before the Un-American Activities Committee.

Q. Do you recall on what day that statement was complete? A. I finished my work on this statement on Sun-

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day, February 2, two days before my husband was arrested.

Q. You are referring to your husband's arrest on February 4, 1947, are you not? A. That is correct.

Q. Now, did you make any preparations for the hearing in Washington on February 6, 1947, to which your husband was subpoenaed? A. Yes, I did. On February 3, which was a Monday, I went to Pennsylvania Station, and I bought two round-trip tickets to Washington, one for my husband and one for myself, in order to go to Washington on February 5 for the hearing before the Un-American Activities Committee.

Q. I show you some railroad tickets and ask you if they are the tickets you purchased on that day. A. That is right; it says, "February 3, 1947."

279 Q. The tickets are both stamped "February 3, 1947," are they not? A. That is right.

Mr. Isserman: Cross-examine.

Cross-Examination

By Mr. Hitz:

Q. Was that statement you cut the stencils for to be given by him to the committee or to be spread to the newspaper people at the meeting? Do you know? A. It was to be given to the newspaper people; but, as far as I know, my husband wanted to use it to state his case before the Un-American Activities Committee.

Q. So it had those two purposes? A. I think so.

Q. Do you have a copy of it with you? A. I don't.

Q. Do you know how many pages it was? A. It must have been about twenty pages, if I am not wrong.

Q. You would remember it if you saw it, would you? A. Excuse me?

Q. Would you remember it if you saw a copy of it? A. I would.

Q. I show you Government Exhibit 7 for identification. Is this the statement that you typed or that you cut

280 on stencils? A. I think it is.

Q. Will you look at the end of it? Perhaps that will help too. It has a page number on it at the conclusion? A. Yes.

Q. So your answer is that this is the statement? A. That is right. That is the statement I typed and I cut the stencils for.

Q. Did you type any other statement for him to deliver at the time of the meeting, whether to the committee or to anyone else? A. No, I didn't.

Q. Did you see whether or not he prepared any other statement to be given to the committee or anyone else at the time? A. I didn't see a statement that he was to give to anybody at that time, but I know that my husband prepared a small statement, or a few remarks, if you want to, which he wanted to make to protest his illegal arrest by the Un-American Activities Committee—instigated by the Un-American Activities Committee.

Q. When did he prepare those remarks? A. He told me when I saw him the morning of February 6 at the Immigration and Naturalization office in Washington that he tried to—

Q. Just a moment. I asked you when he prepared
281 it. Do you know when he prepared it? A. I just want to answer the question.

By the Court:

Q. No; answer the question directly. The question calls for a statement of time. A. Will you repeat the question?

By Mr. Hitz:

Q. Do you know when he made that statement of remarks that he wanted to give? A. I don't know if he wanted to make a statement of remarks or just if he prepared himself a few notes for a statement he wanted to make.

Q. Were you present when he prepared those notes? A. No, I wasn't.

Q. So all you know about it is what he told you about it; is that so? A. That is right.

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Q. Was Mrs. King present when the mimeographed statement, Government Exhibit 7 for identification, was prepared? A. No.

Mr. Hitz: No further questions.

Redirect Examination

By Mr. Isserman:

Q. Just one further question: Did you see your husband from February 4, 1947, to the morning of February 6, 1947?

A. I saw my husband for a short while, while he was
282 detained in Ellis Island.

Q. Did you have any opportunity to confer with him there about any statement? A. I—we spoke together at the hall in Ellis Island. I don't remember; he said something about a statement.

Q. You did not work on any statement then? A. I didn't work on any statement, no.

Q. Did he say something to you about a statement on the morning of February 6, 1947, when you saw him at the office of the District Director of Immigration in Washington, D. C.? A. Yes; he said.

Mr. Hitz: I am sorry; I have to object. I think she has answered the question.

The Court: Yes; objection sustained.

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283 **Gerhart Eisler**

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Direct Examination

By Mr. Isserman:

Q. What is your name, please? A. Gerhart Eisler.

Q. And you are the defendant in this case? A. Yes.

Q. And what is your occupation? A. Writer and journalist.

Q. Mr. Eisler, will you tell us when you came to the United States? A. I came to the United States in June, 1941.

Q. Will you tell us under what circumstances? A. I was a political refugee from concentration camps in France on my way to Mexico.

Q. Do you have any papers from the American Government, United States Government, authorizing you to land in the United States for the purpose of going to Mexico? A. I had a transit visa.

Q. When you say you had a transit visa, that is the authority that was given to you by the United States
284 Consul to land in the United States, was it not? A. Right.

Q. Did you have any other papers? A. Yes, I had a Mexican substitute passport, because I was invited—

The Court: Just a minute, you have answered the question. You need not go over these details because they are irrelevant. You have shown he was here on a transit visa to Mexico. That is enough.

Mr. Isserman: I would like to proceed if I may.

The Court: Ask the next question.

By Mr. Isserman:

Q. I show you a paper and ask you if this is a paper which you had when you landed in the United States in June, 1941? A. Yes.

Q. And I call your attention to the stamp on the paper under date of 8-6-41, that is August 6, 1941, which says "Admitted —"

Mr. Hitz: Just a minute.

The Court: Don't read the contents of the document in front of the jury until it has been admitted in evidence.

Mr. Isserman: I am sorry. May I have this marked as Defendant's Exhibit No. — I think it should be No. 10, Defendant's Exhibit No. 10 for identification.

285 (Document dated August 6, 1941, was marked Defendant's Exhibit No. 10 for identification.)

Mr. Hitz: At this time I would like to say that the Government Exhibit No. 7 for identification referred to with

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the previous witness should be Government's Exhibit No. 6 for identification. May the record show that change, Your Honor?

The Court: Yes, indeed.

Mr. Isserman: This is the Defendant's Exhibit No. 10 for identification and contains a stamp of the American authorities—

The Court: Just a minute, you may not interrogate a witness concerning the contents of an exhibit until the exhibit has been offered and been admitted in evidence.

Mr. Isserman: I am trying, Your Honor, to lay a foundation for its admittance, because it does contain an official stamp.

The Court: If it does the document speaks for itself.

Mr. Isserman: At this time, if the Court please, I offer in evidence Defendant's Exhibit No. 10 for identification.

Mr. Hitz: I object as irrelevant.

The Court: May I see it? (After inspecting document:) I will sustain the objection. The exhibit is irrelevant.

By Mr. Isserman:

Q. Mr. Eisler, did you complete your trip to Mex-
286 ico on the transit visa you had? A. No, I did not.

Q. In June, 1941? A. No.

Q. Did you complete your journey in transit any time subsequent to June, 1941? A. No.

Q. Do you know why you did not complete it?

Mr. Hitz: I object.

The Court: We do not need to go into that. I allowed you to ask a few preliminary questions in order to orient the defendant, so to speak. We always allow that in connection with a defendant taking the stand, but as to the visa I consider it irrelevant. It has no bearing.

Mr. Isserman: I may say we asked the question for a purpose other than argumentation; we would like to make an offer of proof.

The Court: No, that was a question that was raised by your motion to dismiss, was it not, and I heard the motion

to dismiss and I overruled it, so you have a ruling in that matter already. That is in the record.

Mr. Isserman: If the Court please, these are factual matters.

The Court: Yes, but I ruled that the defense was insufficient. My ruling was equivalent to what would have been a demurrer under the old procedure and I ruled that
287 it was insufficient on that issue.

Mr. Isserman: I understand Your Honor's ruling to be that no offer of proof will be allowed on this question?

The Court: Yes.

By Mr. Isserman:

Q. From the time you came to this country, Mr. Eisler, in June, 1941, did you make any effort to leave it? A. Yes, repeatedly from time to time.

Q. What effort did you make?

Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: May I make an offer of proof?

The Court: No; I consider the subject matter irrelevant.

By Mr. Isserman:

Q. Did you at any time subsequent to June, 1941, obtain permission from the United States Government to leave the United States? A. Yes.

Mr. Hitz: I object as irrelevant.

The Court: Objection sustained.

Mr. Hitz: May the witness be cautioned?

The Court: Yes; do not answer the question until counsel has an opportunity to make an objection and the Court has an opportunity to rule on it.

Mr. Hitz: May the answer be stricken if it got
288 in the record?

The Court: Yes.

Mr. Isserman: May I make an offer of proof?

The Court: No.

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By Mr. Isserman:

Q. Did you during the period of the last war, Mr. Eisler, while you were in the United States, register as an enemy alien? A. No.

Mr. Hitz: I object.

The Court: Objection sustained. This matter is entirely irrelevant.

Mr. Isserman: May I make an offer of proof?

The Court: No.

By Mr. Isserman:

Q. During the war period, recent war period, did you support the war effort of the United States?

Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: May I make an offer of proof with respect to the question?

The Court: No.

By Mr. Isserman:

Q. Of what country are you a citizen, Mr. Eisler? A. From Austria.

289 Q. Of what country are you a native, Mr. Eisler?

A. I was born in Germany of Austrian parents; according to German law—

The Court: No, you have answered the question. You are not an expert on law.

Mr. Isserman: May I have the answer?

The Court: His answer was: "I was born in Germany of Austrian parents."

By Mr. Isserman:

Q. In the war period were you ever called by the United States Government to attend any enemy alien hearings on behalf of yourself? A. I couldn't get your question; please may I have the question?

Mr. Isserman: Read the question.

(The pending question was read by the reporter.)

Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: May I make an offer of proof?

The Court: No.

By Mr. Isserman:

Q. Did you at any time in 1946, Mr. Eisler, obtain an exit permit from the Department of State giving you permission to leave the United States?

Mr. Hitz: I object.

290 The Court: Objection sustained.

Mr. Isserman: I would like to make an offer of proof with respect to what this witness would answer if permitted.

The Court: No.

By Mr. Isserman:

Q. Mr. Eisler, at the time you were subpoenaed by the House Committee on Un-American Activities—I will withdraw that.

When was the first time you were subpoenaed by the House Committee on Un-American Activities, Mr. Eisler? A. I think around October 20, 1946.

Q. Where did the subpoena direct you should appear? A. To St. Louis.

Q. Was that a subpoena that directed you to appear before the Committee at St. Louis? A. Yes.

Q. On what date were you to appear there? A. I was supposed to appear on November 23, 1946.

Q. Before November 23, 1946, were you served with a second subpoena, Mr. Eisler? A. Yes, sir, I was served with a subpoena which cancelled the first and directed me to appear in Washington before the Committee on November 22, 1946.

Q. Did you appear in Washington at the hearing of the House Committee on Un-American Activities? A.

291 I did.

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Q. On November 22, 1946? A. I did.

Q. What happened when you appeared there?

Mr. Hitz: I object.

The Court: Objection sustained. I don't see any relevancy or any connection with what happened prior to the action on February 6, 1947. We are concerned only with what transpired at the hearing on February 6.

Mr. Isserman: May I make an offer of proof?

The Court: The indictment is directed solely to the default alleged to have taken place on that occasion.

Mr. Isserman: May I make an offer of proof in respect to it?

The Court: No, but you may state your reason if you wish. I will hear you on that.

Mr. Isserman: If the Court please, we believe this testimony is relevant on several grounds. The first ground is that the prior dealings of the defendant with the Committee in respect to his—

The Court: Well, state briefly what your reason is.

Mr. Isserman: I am trying to state it briefly. We believe this information to be elicited from this witness by this question is relevant first, because it goes to the good faith of the defendant in appearing before the Com-
292 mittee on February 6, 1947; secondly, it goes to the motivation of the Committee in subpoenaing him not only on November 22, 1946, but also on February 6, 1947, for motives which were ulterior and not within the scope of any power given to that Committee by the Congress.

The Court: I will adhere to my ruling and exclude this evidence because, in my opinion, neither one of the grounds advanced by counsel justify the admissibility of the evidence.

By Mr. Isserman:

Q. On and after November—withdraw that.

On and after January 24, 1947, Mr. Eisler, did you have any belief as to the activities of J. Parnell Thomas, Chair-

man of the House Committee on Un-American Activities, in preventing your departure for Germany?

Mr. Hitz: I object.

The Court: Objection sustained. Good faith is not in issue here. The only question is whether there was a default, and whether the default was wilful.

Mr. Isserman: I would like to make an offer of proof.

The Court: No, I don't want you to make an offer of proof.

Mr. Isserman: Will Your Honor hear me on it?

The Court: No, because we have discussed this at variout points during the trial, and previously on a motoin to dismiss. My ruling is that proof of good faith is not
293 a defense because wilfulness does not depend on good faith or bad faith. Wilfulness depends on whether the default, if there was such, was deliberate and intentional. It is immaterial whether it was done for a justifiable motive or an unjustifiable motive; whether it arises under a misapprehension of one's rights, or not, if it was wilful.

Mr. Isserman: I believe I should also point out that it goes to due process—

The Court: I overrule that also because I hold that the Court has no authority to scrutinize the motive of Congress or one of its committees. I have to assume, and I shall assume, that the Committee was making an investigation for proper purposes within the power of Congress; moreover I might say, since the default charged against the defendant is not a failure to answer questions but a failure to take the oath, it is immaterial what the subject matter of the inquiry was going to be.

You may proceed.

By Mr. Isserman:

Q. Now, on January 24, 1947, were you served with a subpoena to appear before the House Committee on Un-American Activities on February 6, 1947? A. I was.

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Q. Do you know the name of the person who served the subpoena on you? A. Mr. Russell; I don't know the first name.

294 Was it Mr. Russell? A. Yes.

Q. And before Mr. Russell served that subpoena was he in touch with you by telephone? A. Yes, he called me and asked me when I would be home in order to serve the subpoena.

Q. Did you make any arrangement with him so that he could serve you with the subpoena? A. Yes, I did.

Q. And what was that arrangement? A. The arrangement was that I would stay home until he could give me the subpoena, which I did.

Q. Now, when you were served with a subpoena on January 24, 1947, did you have any intention as to your appearance before before that committee? A. Yes, sir.

Mr. Hitz: I object.

The Court: Objection sustained; the defendant's intention is immaterial.

Mr. Hitz: May the answer be stricken if it was gotten by the reporter?

The Court: Yes.

Mr. Isserman: I didn't get it?

The Court: The answer may be stricken.

By Mr. Isserman:

295 Q. Did you make any preparation for appearing before the House Committee on Un-American Activities on February 2nd of 1947?

Mr. Hitz: I object.

The Court: I think I will overrule the objection. The defendant's wife testified concerning preparations and her testimony was permitted, so I think I will allow it.

The Witness: I may answer?

The Court: Yes.

The Witness: Yes, I made preparations.

By Mr. Isserman:

Q. Now, you may tell us what preparations you made? A. Well, I prepared a statement which I was ready to give to the Committee and then later to the press.

I conferred with counsel about my rights at such a hearing.

I made technical preparation in regard to railroad tickets, in regard to reservation of hotel rooms in Washington. Those were the preparations.

Q. You say you consulted counsel about your rights at the hearing. What counsel did you consult? A. My counsel, Mrs. Carol King.

Q. Did counsel advise you as to these rights? A. Yes, counsel advised me—

Mr. Hitz: I am sorry, you have answered the question.

The Court: Just answer yes or no.

296 The Witness: Yes.

By Mr. Isserman:

Q. What did you ask your counsel?

Mr. Hitz: I object.

The Court: Objection sustained. I might say the reason I am excluding this line of inquiry is that under the cases the advice of counsel is not a defense. It has been so held by the Court of Appeals of this District in the Townsend case, and the Supreme Court of the United States in the Sinclair case.

Mr. Isserman: Of course, Your Honor is aware of conflicting opinions in this jurisdiction.

The Court: I rule consistently in accordance with what I understand to be the holding of the Supreme Court of the United States and the Court of Appeals that this matter is not relevant.

Mr. Isserman: This is not the time to argue, but I wonder if Your Honor would hear me on that?

The Court: No, because I have been over that, and I might say this, Mr. Isserman, that my practice is not to

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hear extended arguments on questions of admissibilty of evidence. A Trial Judge is not in position to do that and at the same time dispatch business.

Mr. Isserman: May I make an offer of proof in respect to it?

297 The Court: No.

By Mr. Isserman:

Q. Mr. Eisler, did you proceed to Washington on—I withdraw that.

On what day did you plan to proceed to Washington to attend a hearing before the House Committee on Un-American Activities? A. February 5, 1947.

Q. Did you proceed on February 5 as you had planned? A. I did not.

Q. Why not?

Mr. Hitz: I object.

The Court: I think, Mr. Isserman, we have had the facts from four or five witnesses that he was arrested.

Mr. Isserman: I believe the witness should be allowed to testify.

The Court: I beg pardon?

Mr. Isserman: I believe the witness should be allowed to testify.

The Court: I dislike unnecessary examination on matters that are undisputed, but I will let the witness answer the question.

Mr. Isserman: It is preliminary.

The Court: You may answer.

The Witness: I was arrested on February 4, and,

298 therefore, I could not proceed to Washington.

By Mr. Isserman:

Q. And where were you taken on February 4, 1947?

Mr. Hitz: I object on the same ground.

The Court: I will let him answer.

The Witness: I was transported to the office of the District Attorney of Brooklyn, New York; at least I think that was the office.

By Mr. Isserman:

Q. Were you advised there of the purpose of your arrest? A. No, I was not, I was—

Mr. Hitz: I am sorry, you have answered the question.

The Court: The question calls for a yes or no answer.

The Witness: Pardon me, may I have the question, please?

Mr. Isserman: I think you have answered the question.

By Mr. Isserman:

Q. Did anyone show you a warrant at the time ordering your arrest? A. No.

Mr. Hitz: I object.

The Court: Objection sustained. I will not go into matters of the arrest.

Mr. Isserman: If Your Honor please, may I be permitted to make an offer with respect to that?

299 The Court: No, I consider the subject matter to be irrelevant.

Mr. Isserman: I take it Your Honor will not entertain an offer of proof?

The Court: That is correct.

By Mr. Isserman:

Q. After you had been taken to the office of the District Attorney in Brooklyn were you taken any other place? A. Yes, to Ellis Island.

Q. How long were you in Ellis Island?

Mr. Hitz: I object.

The Court: I will let him answer.

The Witness: I arrived at Ellis Island on the 4th about 2 o'clock in the afternoon until the 5th about 3 o'clock in the afternoon.

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By Mr. Isserman:

Q. And what happened on February 5 at 3 o'clock in the afternoon? A. I was told I would be brought in custody of two guards to Washington.

Q. Who told you that? A. An officer at Ellis Island and the two guards involved.

Q. Are the two guards you refer to the officers of the Department of Immigration and Naturalization who
300 testified previously at this hearing? A. Yes, those were the two gentlemen.

Q. Did the guards tell you where you would be taken? A. They told me they knew nothing only that they were to take me to Washington.

Q. Did they ask you if you wanted to go to Washington?

Mr. Hitz: I object.

The Court: He may answer.

The Witness: No, they did not.

By Mr. Isserman:

Q. Now, when did you arrive in Washington? A. I arrived at the station about 9 o'clock in the evening, and I was brought to the District Jail, I think it is called the Washington District Jail.

Q. And did you you stay in the District Jail overnight? A. Yes, I stayed there.

Q. And from the time of your arrest to the time you were confined in the District Jail had you consulted with your counsel, Carol King? A. No.

Mr. Hitz: I object; I am sorry, I object.

The Court: I will let him answer, but just answer the question.

The Witness: No, I did not.

By Mr. Isserman:

301 Q. Now, what happened on the morning of February 6, 1947? A. I was brought in the morning, I guess it was about 8 o'clock, or a little later, I don't know

exactly the time, from the District Jail to the office of Immigration and Naturalization.

Q. And about what time in the morning was that?

The Court: He has already answered that. He said about 8 o'clock.

Mr. Isserman: I am talking now about the time he reached the office of the Director of Immigration. I do not believe the witness did answer that.

The Court: Well, you may answer it again.

The Witness: I did not have a watch but I think it was between 8 and 8:30 in the morning.

By Mr. Isserman:

Q. And while at the office of the District Director of Immigration and Naturalization did you there confer with your counsel Carol King? A. Yes.

Q. Was that conference in private or in the presence of other persons? A. It was not in private; the two very correct security officers were always around.

Q. Did your counsel give you any advice with re-
302 spect to your appearance before the hearing later that day?

Mr. Hitz: Answer yes or no, please.

The Witness: Yes.

By Mr. Isserman:

Q. And by the hearing I mean the hearing before the House Committee on Un-American Activities. A. Yes.

Q. What did you ask your counsel?

Mr. Hitz: I object.

The Court: Objection sustained.

By Mr. Isserman:

Q. Did you ask your counsel anything about—

The Court: No, you need not pursue this question.

Mr. Isserman: I would like to make an offer of proof.

The Court: No, it is not necessary. I am going to rule

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out the subject matter of any conference between the defendant and his counsel.

Mr. Isserman: That would be true of questions asked this witness by Mrs. King if I called her, is that correct?

The Court: I only rule on one thing at a time. I am now only ruling in so far as this witness is concerned.

By Mr. Isserman:

Q. Now, did you have any writing materials with you when you were in the Washington Jail on the night of February 5 and the morning of February 6, Mr. Eisler?

303 A. Yes, sir.

Q. What did you have? A. A few pieces of yellow sheets.

Q. Did you ask for an opportunity to do some writing while you were confined in the jail? A. I asked it very urgently.

Q. And were you given such an opportunity? A. No, I don't think I was.

Q. Did you have any light by which you could write?

The Court: I think all this is irrelevant.

Mr. Isserman: I would like to make an offer of proof.

The Court: No, I won't let you do that because I consider it irrelevant. I am permitting you to show the chronology of events but I am not going to permit you to go into details that are not germane to any issue.

Mr. Isserman: In this case it is not a matter of chronology but a matter of preparation of some remarks which have been testified to here and will be testified to.

The Court: No, I will exclude it.

By Mr. Isserman:

Q. Did counsel remain with you from the time you conferred with counsel in the office of the Director of Immigration and Naturalization until you were brought to the hearing room of the House Committee on Un-American Activities? A. No.

304 Q. When did you next see counsel after you saw counsel in the District Director's office? A. I saw her, if I recollect, a few minutes before the hearing started or in the committee room.

Q. Did you at the time you entered the committee hearing room, Mr. Eisler, know whether or not counsel would be allowed to be with you when you were under examination by the Committee?

Mr. Hitz: I object.

The Court: I am going to allow it. You may answer.

The Witness: No, I did not know whether my counsel would be allowed.

By Mr. Isserman:

Q. Had you any reason on the morning of your appearance at the hearing room of the House Committee on Un-American Activities to believe that you would not have counsel with you?

The Court: Well, now, that I am going to exclude.

Mr. Isserman: I would like to make an offer of proof.

The Court: No, that is argumentative. He did not know whether counsel would or would not be allowed. I permitted that answer but I am going to exclude the other one.

Mr. Isserman: I want to show the basis of the uncertainty on the witness' part, if Your Honor please.

The Court: Well, I have excluded it.

By Mr. Isserman:

305 Q. Will you describe the conditions in the hearing room when the hearing commenced on the morning of February 6, 1947, when you were brought into the hearing room— A. (Interposing) Yes, sir.

Q. (Continuing) —by the security officers of the Immigration and Naturalization Department? A. Well, if I recollect, it was quite noisy, reporters were rushing in and out, and photographers were flashing bulbs, and there was some considerable excitement in this committee room.

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Q. Now, so far as you were concerned, Mr. Eisler, what was the first thing that happened after you were at the hearing room on the morning of February 6, 1947? A. I think the first thing that happened was that somebody—I think it was Mr. Thomas or Mr. Stripling, I can't recollect—asked me to take the stand.

Q. Mr. Thomas has testified at this hearing to the effect that—

Mr. Hitz: I object, that is improper direct examination of any witness.

Mr. Isserman: A question by way of rebuttal—

The Court: I beg pardon?

Mr. Isserman: A question by way of rebuttal of the Government's testimony.

The Court: I will let you ask the question and I
306 will rule on it afterward.

By Mr. Isserman:

Q. Mr. Thomas has testified at this hearing that you were asked to take the stand.

The Court: When you say "at this hearing" do you mean this trial?

Mr. Isserman: That is correct; I mean at this trial. I will withdraw the question.

By Mr. Isserman:

Q. Mr. Thomas has testified at this trial, Mr. Eisler, that after you were asked to take the stand you said, "I am not going to take the stand," and I ask you now whether you made that statement? A. Yes, it was the first part of the statement which I was not able to answer because I was interrupted.

Q. What was the second part? A. I wanted to say—

The Court: No, you have answered the question.

By Mr. Isserman:

Q. Now, will you tell us how you wanted to complete the statement if you had not been interrupted, Mr. Eisler? A. "Before I make a few remarks."

Q. In other words, you said you were not going to take the stand until after you made a few remarks? A. Right.

307 Q. As a matter of fact, did you take the stand after you made the statement you would not take the stand? A. A few minutes later I went to the stand.

Q. Now, it has been testified to here, Mr. Eisler, that you said at the hearing on the morning of February 6, the following statement:

"Before I take the oath"—

Mr. Stripling said: "Mr. Chairman."

And you said, "I have the floor now."

Now, would you tell us what you meant by that statement? A. The statement—

Q. That "I have the floor now"? A. I was merely angry because Mr. Stripling, who is not the chairman of the committee, interrupted me, not the Chairman of the Committee, and so I wanted to tell him; I was appealing, so to speak, to the Chairman of the Committee to get a chance to complete my sentence.

Q. So the statement was that before you took the oath— A. (Interposing) I wanted to make a few remarks.

The Court: Just a minute.

The Witness: Pardon.

By Mr. Isserman:

Q. The statement you made before you were to take the oath was not a complete statement? A. No.

308 Q. And Mr. Stripling prevented you from making a complete statement? A. Yes.

Q. And what did you want to say? A. Before I took the oath I wanted to make a few remarks in connection with my arrest.

Q. Now, I would like to call your attention to the fact that Mrs. Eisler testified that you had before the night of February 2, 1947, completed—

The Court: Now just a minute, Mr. Isserman, I do not think that is a proper form of direct examination. You

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cannot frame your questions on direct examination so as to refresh the witness' recollection by referring to some other witness' testimony.

Mr. Isserman: My purpose was to save time but I will do it the other way.

The Court: Well, ask the question.

By Mr. Isserman:

Q. Mr. Eisler, you prepared a statement which you expected to read before the committee on February 6, 1947, did you not? A. I did.

Q. And when was that statement completed? A. On February 2, 1947, Sunday evening.

Q. And that was a lengthy statement, was it not?

309 A. It was 20 pages, at least 20 pages.

Q. Now, was it your intention to read that statement when you said, "Before I take the oath I want to make a few remarks"? A. No, the reading of that statement would have taken one hour at least.

Q. Mr. Eisler, on February 6, 1947, when you were present before the House Committee on Un-American Activities did you at any time refuse to be sworn? A. No; I made repeated efforts to be sworn in.

By the Court:

Q. When you say you made repeated efforts to be sworn you mean you made offers to be sworn on condition— A. (Interposing) Yes.

Q. (Continuing) —that first you be given an opportunity to speak? A. Correct.

Q. You did not make any unconditional offer to be sworn, did you? A. It was conditioned if I would be allowed three minutes to speak I would unconditionally take the oath.

By Mr. Isserman:

Q. And did you tell the members of that Committee and the Chairman how long a period you desired in which

310 to make a few remarks? A. Many times exactly three minutes.

Q. At the hearing on February 6, 1947, did you refuse to answer any questions? A. I made—

The Court: Well, I do not think you need to go over that because there is no contention that any questions were asked.

Mr. Isserman: There has been evidence and I would like to get the witness' own story.

The Court: No, the Government does not contend that he refused to answer questions so it is unnecessary to refer to something not contended for.

Mr. Isserman: But I believe the witness should be allowed to state what he did say on the morning of the hearing. May I be permitted to ask the question?

The Court: The Government does not contend that any questions were asked of him, or that he declined to answer any questions, therefore it is irrelevant because the default charged against him is the refusal to take the oath, and that is the only default.

Mr. Isserman: I would like to call your attention to the fact that Mr. Thomas was allowed to testify to all the questions and that he did testify that some of the testimony involved the question that Mr. Eisler refused to be sworn and I would like to interrogate him as to what statements

311 were made at the hearing.

The Court: You may do that, yes. I was only ruling out the particular question as asked. You may reframe the question.

By Mr. Isserman:

Q. Will you tell us what you said to the Committee after they asked you to be sworn, after Mr. Thomas asked you to be sworn on the morning of February 6, 1947? A. I told them many times, "Give me a chance to speak three minutes and then I will take the oath and make my statement."

Q. You say you said that to the more than once? A. I

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don't know how many times but I repeated it quite a few times.

Mr. Hitz: May I have the answer read?

(The last answer was read by the reporter.)

Mr. Hitz: The answer to the question before that.

(The previous answer was read by the reporter.)

By Mr. Isserman:

Q. Did you make any statement before the Committee in respect to the reading of the statement which you had prepared and completed on February 2, 1947? A. No.

Q. Mr. Eisler, why did you ask the Committee for three minutes to make some remarks before you would be
312 sworn on the morning of February 6, 1947? A. Because I had objection against the whole, what I considered unlawful proceedings of this Committee against my person.

Q. Had you consulted with counsel with respect to your right to object to being sworn— A. (Interposing) Yes.

Q. (Continuing) —on the morning of February 6, 1947?

The Court: Just a minute, Mr. Isserman, I am going to exclude that for the reason heretofore stated.

By Mr. Isserman:

Q. Have you any recollection, Mr. Eisler, what you intended to say in the three minutes of remarks had the Committee allowed you to make them?

Mr. Hitz: I object.

The Witness: Yes.

The Court: I will let him answer the preliminary question.

The Witness: Yes.

By Mr. Isserman:

Q. Now, will you tell us what you intended to say to the House Committee on Un-American Activities in the three minutes you asked for before being sworn?

Mr. Hitz: I object.

The Court: Objection sustained.

313 Mr. Isserman: May I make an offer of proof?

The Court: No, it is not necessary; I consider that irrelevant.

Mr. Isserman: I believe if Your Honor would hear my offer of proof it would not be irrelevant. I believe Your Honor would do consider it.

The Court: Ordinarily I do not permit offers of proof before the jury because that is an indirect way of getting testimony in before the jury after the Court has excluded it. Moreover, I consider the subject matter irrelevant.

Mr. Isserman: I am perfectly willing to make the offer of proof at the bench if Your Honor will allow us to make it there.

The Court: You may come to the bench.

(Counsel for both sides approached the bench, and the following occurred:)

The Court: Make it very brief. Do not take the full three minutes; make it very brief.

Mr. Isserman: The defendant, if allowed to answer this question, would state that he would have made the following remarks: "I am a political prisoner"—

The Court: No, I am not going to allow you to read the whole statement. What is the general import?

Mr. Isserman: To the Committee causing his illegal arrest because the illegal arrest was procured by Mr.

314 Thomas and members of the House Committee on Un-American Activities; that the purpose of the arrest was for no purpose within the scope and power of the House Committee on Un-American Activities.

The Court: I think you have given me enough to give—

Mr. Isserman: If you will hear me.

The Court: Make it very brief.

Mr. Isserman: I am trying to make it very brief; that he had no opportunity for full consultation with his coun-

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sel; that he was going to ask for an adjournment until the matter of his arrest had been cleared up, and that the purpose of subpoenaing him had no relevancy to any matter within the powers of the Committee; that the Committee had called him because of his political views, and to prevent his departure to Germany.

The Court: I shall adhere to my ruling.

(Counsel returned to the trial table, and the following occurred:)

By Mr. Isserman:

Q. Now, Mr. Eisler, after you had—withdraw that.

Mr. Eisler, had you been allowed to make your statement of three minutes would you have then answered all questions put to you by the Committee?

Mr. Hitz: I object.

The Court: Objection sustained; that is specula-
315 tive and conjectural.

By Mr. Isserman:

Q. Mr. Eisler, at the time you were in the hearing room did you make any statement to the Committee which indicated that if you were allowed the three minutes to make your objections that you would have answered the questions and been sworn?

Mr. Hitz: I object.

The Witness: I did.

The Court: I will let the answer stand, but don't answer until counsel has had an opportunity to get his objection in and the Court has an opportunity to make its ruling.

By Mr. Isserman:

Q. Mr. Eisler, I ask you whether or not at the hearing on February 7—February 6 before the House Committee on Un-American Activities you made the following statement:

"I have never refused to be sworn in. I came here as a political prisoner. I want to make a few remarks, only three minutes before I will be sworn in to answer your questions and make my statement. It is three minutes."

Did you so state at the hearing? A. Yes.

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316 Mr. Isserman: May I suggest I may have one or two additional questions of Mr. Eisler?

The Court: Oh, yes.

Mr. Isserman: Not to be precluded.

The Court: Oh, no.

Ladies and gentlemen of the jury, we are going 317 to suspend at this time until tomorrow.

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322 The Court: You may proceed.

Mr. Isserman: If the Court please, I had reserved the right to ask the defendant a few more questions. I should like to do so at this time.

The Court: You do not reserve the right; the Court will grant that privilege in its discretion.

Mr. Isserman: I mentioned it at the close of the session yesterday.

The Court: You may proceed.

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Direct Examination (resumed).

By Mr. Isserman:

Q. Mr. Eisler, you testified that when you were in the Washington Jail on the morning of February 6 you 323 had some yellow paper in your possession? A. Right.

Q. By that paper, you were referring to paper similar to the kind I am indicating? A. That is right.

Mr. Isserman: Indicating legal manila paper.

By Mr. Isserman:

Q. Now, at the time you were before the Committee, did you have any papers in your hand—that is, on the morning

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of February 6? A. Yes; I had a few sheets of paper and a few newspaper clippings.

Q. Were those sheets which you had the yellow papers that you have just testified about? A. That kind of yellow sheets.

Q. Was there any writing on those yellow sheets? A. There were notes on them.

Q. Had you made those notes? A. Yes, I had made notes in the District Jail.

Q. Will you tell us the contents—

Mr. Isserman: I withdraw that.

By Mr. Isserman:

Q. Was it your intention to use those notes in making your objection before you were sworn?

Mr. Hitz: Please do not answer. I object.

324 The Court: This question assumes a fact concerning which there has been no testimony. The word "objection" has never been used before by this witness.

Mr. Isserman: I would like to call the Court's attention to a statement by this witness in the record.

The Court: Where is it? The witness testified he wished to make a statement concerning the circumstances of his arrest.

Mr. Isserman: I call the Court's attention to a statement by the witness on page 312, which is in answer to a question which commences on page 311 of the record.

The Court: Will you read the question, please?

The Reporter: (Reading) "Question: Was it your intention to use those notes in making your objection before you were sworn?"

The Court: What is the objection, Mr. Hitz?

Mr. Hitz: I think the objection has been answered. I did not recall the foundation laid for the question.

The Court Yes; I think there is a foundation.

Mr. Hitz: Yes; I think it is proper, and I shall not object. I withdraw my objection.

The Witness: This was the basis of my—

By the Court:

Q. Just answer yes or no. A. Will you repeat the question?

325 The Reporter: (Reading) "Question: Was it your intention to use those notes in making your objection before you were sworn?"

The Witness: Yes.

By Mr. Isserman:

Q. Do you recall what was on those yellow sheets of paper, Mr. Eisler? A. I recollect—

The Court: I am going to exclude that.

Mr. Hitz: I object to it.

Mr. Isserman: May I make an offer of proof?

The Court: No, it is not necessary to make an offer of proof, because I consider the matter irrelevant. I think an offer of proof is necessary to protect a party's rights if the admissibility of the evidence depends in whole or in part on the nature of the answer. But where the subject matter itself is irrelevant, it is not necessary to make an offer of proof to protect a party's rights.

By Mr. Isserman:

Q. Now, Mr. Eisler, you intended to use those notes in stating your objection before you were sworn, did you not?

Mr. Hitz: I object on two grounds: The question is leading and is irrelevant.

The Court: I am going to sustain the objection on the ground that the question has already been answered.

326 By Mr. Isserman:

Q. Mr. Eisler, will you tell us the language in which you intended to state your objection to the Committee on the morning of February 6, before you would be sworn?

Mr. Hitz: I object.

The Court: Objection sustained.

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Mr. Isserman: May I make an offer of proof?

The Court: No, it is not necessary. I have told you before when I think an offer of proof is proper. One ruling protects just as much as a repetition of it.

Mr. Isserman: I just wanted to make certain that the witness' rights in respect to this question are protected.

The Court: I am stating that one ruling protects you just as much as though the same ruling were repeated a dozen times.

By Mr. Isserman:

Q. I call your attention, Mr. Eisler, to a question on page 307 of the record, which was put to you yesterday by me. The question reads as follows:

"As a matter of fact, did you take the stand after you made the statement you would not take the stand?"

I call your attention to your answer, which reads:

"A few minutes later I went to the stand."

Does that answer correctly give the answer you intended to make at yesterday's hearing? A. Definitely it is
327 not my answer.

Q. Will you tell us what answer you intended to make at yesterday's hearing? A. I intended to say I went to the stand a few seconds later.

Q. Did you have with you on the morning of February 6, 1947, at the hearing before the Committee on Un-American Activities, a copy of the long mimeographed statement which you had completed by February 2, 1947? A. I had it in my pocket.

Q. Did you intend to make any use of that statement at the hearing before the Committee? A. Of course.

Q. What use did you intend to make of that statement? A. I wanted during the—in the course of the hearing to read the statement after I had taken the oath, and would have given it later to the press.

Q. Did you intend to read that statement when you asked for time to make objection to the Committee's proceedings? A. I wanted three minutes—

The Court: We were over that yesterday.

Mr. Isserman: May he be allowed to finish? That is my last question.

The Court: Very well.

The Witness: I asked for three minutes for ob-
328 jections. This reading of the statement would have taken one hour.

Mr. Isserman: That is all.

Cross Examination.

By Mr. Hitz:

Q. Did you tell the Committee you had a statement that would take one hour to read, Mr. Eisler? A. No, I didn't.

Q. As a matter of fact, the statement itself you intended to read before you were asked any questions, did you not? A. No, by no means.

Q. Isn't it a fact that you had in the statement something to the effect that you were not going to answer certain questions?

Mr. Isserman: If the Court please, the statement has been marked for identification by the United States Attorney. We have no objection to the entire statement going into evidence if it is going to be referred to as to its contents, although we believe it is irrelevant under Your Honor's previous ruling.

The Court: This is proper cross examination.

By Mr. Hitz:

Q. Isn't it a fact that in that statement you intended to read, as you say, after you were sworn and, as you say, after you had been asked certain questions, you said,
329 "I will not answer certain questions," and you stated what those conditions would be?

Mr. Isserman: I have to make an objection—

Mr. Hitz: Let me finish my question.

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By Mr. Hitz:

Q. Isn't it a fact that you mentioned in detail the questions that you would refuse to answer were you asked them? A. Yes, I think so.

Mr. Isserman: I would like to object to that question on the ground—

The Court: The question has been answered by the witness; and this is cross examination.

Mr. Isserman: May I save my objection to this line of questioning?

The Court: What is your objection?

Mr. Isserman: My objection is that, under the rulings of this Court, the witness is not charged with refusing to answer any questions. The questions directed by counsel for the defendant to the defendant yesterday were overruled because of that.

The Court: The test of what is proper cross examination is twofold: Cross examination may relate either to matters brought out on the direct examination, or it may relate to credibility. I think that this question is proper on either ground or on both grounds.

330 By Mr. Hitz:

Q. I think you have answered the question; have you, Mr. Eisler? A. Not fully yet.

Q. Please answer it as fully as you care to. A. This statement—

Q. I think the question is, Didn't you state in your written statement that there were a number of questions that you would refuse to answer should you be asked them? That was the question. Have you answered the question? A. If you would give me for recollection the text of my statement, I could answer more perfectly.

Q. You wrote it, didn't you? A. Quite a time since then; many things happened.

Q. I will get on to the next question, and your counsel, if necessary, can show you that.

Mr. Isserman: If the Court please, the witness has been asked a question.

The Court: Counsel may not interrupt the examination of a witness except for the purpose of noting an objection; and I will rule on the objection.

Mr. Isserman: I should like to make a motion.

The Court: What is the motion?

Mr. Isserman: My motion is that this witness be allowed to refresh his recollection from the statement which
331 the Government Attorney has in his hands.

The Court: That is an improper motion. If the question was persisted in, and the witness said he could not remember, and he stated a desire to refresh his recollection, he would be permitted to do so. But the question has been abandoned.

Mr. Isserman: I will withdraw the motion if the question has been withdrawn.

By Mr. Hitz:

Q. Does not that refresh your recollection, Mr. Eisler, as to whether or not you intended making this statement before being asked any questions instead of after being asked any questions? A. About this, I don't need any refreshment of my recollection. This statement I wanted to make after I took the oath, in the course of the hearing. It was a one-hour statement, not a three-minute statement.

Q. Did you intend making it before or after you were asked questions by the Chairman and the members of the Committee? A. Well, I didn't know how the Committee would decide. I would have asked in the course of the hearing to give me a chance to make this statement whenever the members of the Committee thought it opportune; but I wanted to have it during the hearing.

332 Q. You told them in the statement, did you not, or intended to tell them, that you would not answer any questions about any friends or relatives or acquaintances, and you would not even tell them who your laundry

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man was? A. I didn't think my laundry man was relevant to the question on investigation.

Q. But you also said you would not mention any friends' or acquaintances' names; isn't that so? A. So far as I can recollect, I said I would answer—and I have answered—all pertinent questions; I would not answer questions which are not pertinent to the case on investigation; and the case on investigation, in which the statement was directed, was the testimony of a certain Budenz on November 22. Against this man my statement was correct.

Q. You also said you would not answer anything concerning your biography? A. I don't think the question of my—

By the Court:

Q. Just a moment. Answer the question yes or no. A. So far, my biography was not relevant to the question of investigation.

By Mr. Hitz:

Q. So you were imposing conditions to your questioning even before you had taken the stand; is that not true? A. No, by no means. That was a proposal. If the Com-
333 mittee would have convinced me certain questions were relevant, I would have answered these questions.

By the Court:

Q. You mean you would have made yourself the judge? A. By no means, Mr. Judge. If the Committee would have told me, "Certain parts of your biography are relevant," and would have convinced me they are relevant, I would have given them also parts of my biography.

By Mr. Hitz:

Q. You would not have given them the names of any of your friends, would you, Mr. Eisler? A. I would have

given them only such friends which I was sure they could not slander and defame.

Q. You would judge that, would you not? A. I guess I would.

Q. So you had a condition, did you not, upon the questions that you would answer? A. By no means. It didn't come into the investigation, not even into the proceeding, what I would have done if the statement would have come into the hearing. That was a question of fact of the whole Committee.

Q. You never intended to answer fully the questions of the Committee? A. I know there are certain questions the Committee is not allowed to ask me, for instance,
334 and I would have a legal right to refuse. I think they had no legal right to ask me questions which were not pertinent to the case in investigation.

Q. You would be the judge? A. No, I would not be the judge. I would have asked my counsel. I would have stated my objections to the Chairman and the other members of the Committee, and I would have tried to convince them of the rightfulness of my objections and my position; and I think if it would have come to such a discussion, maybe a few members of the Committee would have seen my point of view.

Q. You say you would not have been the judge? You can answer that yes or no. A. I am not a judge.

Q. You would not have been judge or whether it was pertinent or not? A. Not the only judge.

Q. You would have asked your counsel? A. Sure, I would.

Q. Wasn't she there with you? A. Well, she was there.

Q. You intended to ask her in the Committee room whether you had to answer the questions? A. I would have asked her any questions where there would have been a legal doubt in my mind.

335 Q. Before you answered the question? A. Before I answered the question; that is correct.

Q. In the Committee room? A. If I would have got the opportunity in the Committee room; if not, outside.

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Q. You testified yesterday you did not know whether you would be allowed to consult with her or not, didn't you? A. Absolutely.

Q. As a matter of fact, Mr. Eisler, you in your own words, that you had expressed in writing, actually delivered to the press, were in contempt; that is, you felt a contemptuous feeling for the Committee; isn't that true? A. I felt a very much contemptuous feeling, absolutely.

Q. You did? A. Yes.

Q. Mr. Eisler, you never did answer any questions, of course, except those relating to your taking the stand or not taking the stand; correct? A. I didn't have any opportunity.

Q. You never took the oath to testify, did you, Mr. Eisler? A. I was prevented to take the oath by illegal proceedings of the Committee.

Q. You did not take the oath, did you?

By the Court:

336 Q. Answer yes or no. A. I couldn't take the oath.

Q. Answer yes or no. Did you take the oath? A. No, I didn't take the oath.

Mr. Hitz: No further questions.

Redirect Examination

By Mr. Isserman:

Q. When you said a moment ago that you had a contemptuous feeling toward the Committee, was that related to the question of whether you would be sworn or make answers, or not? A. No, sir. That is my private feeling, which is every man's right.

Q. Upon what is that contemptuous feeling based, which you say is your private feeling? A. On the whole biased practice of this Committee, which I know from the past, and especially the past practice against me.

The Court: Just a moment. I am going to exclude that question. I think it is irrelevant.

By Mr. Isserman:

Q. You testified that in determining whether any question was pertinent or not, you would ask your counsel; is that correct? A. Right.

Q. Were you advised by counsel that you had under
337 the law a right not to answer questions that were not pertinent?

The Court: I am going to exclude, as I did yesterday, any advice of counsel. I am doing so on the authority of the Sinclair case as well as on the authority of the Townsend case.

Mr. Isserman: This is the advice of counsel in respect to a matter opened up by the State.

The Court: I am going to exclude that.

By Mr. Isserman:

Q. Mr. Eisler, did you know—had you been advised—as to the law in respect to your obligation to answer questions before the Committee on Un-American Activities?

The Court: I am going to exclude that on the same ground.

By Mr. Isserman:

Q. Do you know what the law was in respect— A. Yes, I knew.

The Court: Just a moment.

By Mr. Isserman:

Q. Let me finish my question.

Mr. Eisler, do you know what the law was in respect to your rights before the Committee on Un-American Activities in answering questions from the standpoint of whether those questions were pertinent to the investigation or not?

The Court: I am going to exclude this question for
338 the same reasons. The Townsend case and the Sinclair case hold that even if the witness had a misconception of his legal rights, even if it was in good faith, that would constitute no defense.

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Mr. Isserman: At this point it is not a question of misconception of his rights; I asked him if he knew the law in respect to pertinent questions. Your Honor knows there is a section of the law which governs that.

The Court: Yes, but it is immaterial whether he knows it or not, or whether he knows it correctly or incorrectly, because those questions of law are for the Court to determine. What this witness' view of the law was is immaterial.

Mr. Isserman: Well, then, I ask the Court to charge accordingly.

By Mr. Isserman:

Q. Now, in the statement—the mimeographed statement—which you had with you, was there anything in that statement which indicated that it would be read by you before the Committee on Un-American Activities after you were sworn? A. I think so.

Q. Can you tell us what was in the statement which indicated that you would give it after you were sworn, Mr. Eisler? A. I couldn't recollect exactly the words. If you would let me refresh my memory, I could give it in
339 exact words.

Q. I show you page 18 of the mimeographed statement and ask you if that is one of the pages of the statement to which you have been referring? A. Yes.

Q. Is there anything on that page which indicates that you indicated to read that statement before the House Committee on Un-American Activities only after you were sworn? A. Yes.

Q. Would you please, using that statement to refresh your recollection, tell us what it contained? A. "I am fully conscious of the fact that I had to speak under oath, and therefore I tried to speak to the best of my knowledge."

There the sentence ends.

Mr. Isserman: No further questions.

Recross Examination

By Mr. Hitz:

Q. On the next page, didn't you say:

"In order to save your time when it comes to questioning, I shall tell you what I am going not to answer"? A. Would you let me refresh my recollection, please?

The Court: Yes.

By Mr. Hitz:

Q. I just read it to you. On the next page, page 19,
340 didn't you say that, Mr. Eisler? A. "In order to save your time when it comes to questioning, I shall tell you what I am going not to answer."

Right.

Mr. Hitz: That is all.

Further Redirect Examination

By Mr. Isserman:

Q. Mr. Eisler, if the Committee had directed you to read that statement at the end of your testimony, you would have done that; isn't that so? A. Absolutely.

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341 **Mrs. Carol King**

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Direct Examination

By Mr. Isserman:

Q. May we have your name, please? A. Carol King.

Q. You are an attorney, Mrs. King? A. I am.

Q. How long have you been a member of the Bar? A. Twenty-seven years.

Q. On or about October 1, 1947, was Mr. Gerhart Eisler one of your clients? A. What was the date?

Q. 1947. A. Yes.

Q. October, 1947? A. October, '47?

Q. I am sorry. I withdraw that question.

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On or about October, 1946, was Mr. Gerhart Eisler your client? A Toward the end of October, as I recall it.

Q. Did he consult you with respect to a subpoena
342 he had received from the Committee on Un-American Activities requiring him to appear in St. Louis on November 23, 1946? A. He did.

Q. And did he consult with you any subsequent time with respect to a subpoena which he had received requiring him to appear in Washington before the House Committee on Un-American Activities on November 22, 1946? A. He did.

Q. And did he later consult with you in respect to a subpoena he had received on January 24, 1947, requiring him to appear before the House Committee on Un-American Activities on February 6, 1947? A. In a somewhat limited way he did.

Q. Now, will you tell us whether or not you advised him as to procedure before Congressional investigating committees? A. I did.

Q. And what did you advise him?

Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: May I make an offer of proof?

The Court: No, it is not necessary because I consider this subject matter irrelevant.

By Mr. Isserman:

Q. Did you give him advice on the law pertaining to the questions which a witness before the House Commit-
343 tee on Un-American Activities was required to answer?

Mr. Hitz: Please don't answer. I object.

The Court: Objection sustained.

Mr. Isserman: I would like to make an offer of proof in this connection.

The Court: No, you do not have to repeat that each time. I hold you do not need an offer of proof.

Mr. Isserman: Is Your Honor ruling that any question put to this witness relating to advice she gave the defen-

dant pertaining to his appearance before the House Committee on Un-American Activities will not be permitted?

The Court: Yes, I so rule and, therefore, it is not necessary for you to ask further questions along this line. My ruling applies to this entire line of questioning.

By Mr. Isserman:

Q. I would like to ask you just this one more question on qualification and I think I will be finished.

In your course of practice, Mrs. King, did you become familiar with the course of practice before investigating committees? A. I did.

Mr. Isserman: Now, in view of Your Honor's ruling, I have no further questions.

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344 Mr. Isserman: If the Court please, the defense rests at this point.

Mr. Hitz: I have one rebuttal witness, Mr. Stripling.

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Robert E. Stripling

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Direct Examination

By Mr. Hitz:

Q. Mr. Stripling, inviting your attention to the first part of the hearing before the Un-American Activities Committee on February 6, 1947, and in particular to the first question that was asked Mr. Eisler by you with reference to taking the stand, which was:

"Mr. Stripling. Mr. Gerhart Eisler, take the stand."

Did you say that to Mr. Eisler? A. I did.

Q. Was that the first thing that you had said to Mr. Eisler after the meeting had convened that morning? A. Yes, sir.

Q. And to that did Mr. Eisler make this reply:

"Mr. Eisler. I am not going to take the stand."? A. Yes, sir.

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Q. Did you follow that with the question: "Do you
345 have counsel with you?"

The Court: Mr. Hitz, isn't this already in the record?

Mr. Isserman: It is, if the Court please.

Mr. Hitz: Not what I am going to bring out.

The Court: I mean these questions and answers are in the record?

Mr. Hitz: Yes, these questions and answers are in the record of the Committee.

The Court: No, I mean in the record of this trial.

Mr. Hitz: They are in the record of this trial.

The Court: That being so I was wondering why you are repeating them.

Mr. Hitz: I am repeating them because they are the foundation questions to the questions I am leading up to, which is the rebuttal question.

The Court: Very well.

By Mr. Hitz:

Q. Did you then ask Mr. Eisler: "Do you have counsel with you?" A. I did.

Q. Was that your second question to him? A. It was.

Q. When you asked that question did you cut off the reply
Mr. Eisler then made, which was, "I am not going to
346 to take the stand"? A. I did not.

Mr. Hitz: That, Your Honor, is the rebuttal question.

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The Court: Do both sides rest?

Mr. Isserman: Both sides rest, if the Court please.

Mr. Hitz: We rest.

The Court: Are there any prayers for instruction?

Mr. Isserman: Yes, sir.

The Court: You may hand them up and come to the bench and I will announce my ruling at the bench.

(Counsel for both sides approached the bench and the following occurred:)

Mr. Isserman: If the Court please, I would like time to prepare one additional instruction.

The Court: Give it to me orally. I will take it orally.

Mr. Isserman: We request the Court to charge that under Title 2, Section 192 of the U. S. Code, a witness before a Congressional committee is only required to answer questions which are pertinent to the matter under investigation.

347 The Court: I shall decline to so charge because it is irrelevant to the issues in this case.

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349 Mr. Hitz: I have no prayers, but I would like to have the definition the Court is going to give on the word "wilful."

The Court: Yes, I have it prepared and I shall be glad to give it to counsel. I am going to give the same definition that I gave in the Fields' case:

By the term wilful is meant merely the failure or refusal to be sworn was not inadvertent, was not accidental, but was deliberate and intentional. The word wilful may also mean conduct marked by careless disregard of, or plain indifference to, the requirements of the statute. The word wilful does not mean that the failure or refusal to comply with the order of the committee must necessarily be for an evil or for a bad purpose. The reason or the purpose of the failure to comply, or the refusal to comply, is immaterial so long as the refusal was deliberate and intentional and was not a mere inadvertence or an accident.

Mr. Isserman: We would like to object to that portion of the charge at this time.

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350 The Court: You have a motion, Mr. Rein?

Mr. Rein: I would like to make it at the counsel table.

The Court: No, you will make it right here. I will not hear argument. Just state the grounds. Our practice, ex-

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cept under unusual conditions, is to make these motions at the bench.

Mr. Rein: I would like to make a motion for acquittal at this time, and I will state the grounds.

The Court: You need not repeat the grounds you have heretofore raised, but if you have any additional grounds.

Mr. Rein: To make certain, Your Honor, that I have all the grounds stated I would like to state them, and I won't be very long.

The Court: Make it very brief.

Mr. Rein: The first ground is that the defendant is an alien in transit in this country, and was not subject to subpoena before—

351 The Court: Now, you have already made that and I have denied it.

Mr. Rein: I am not going to argue it.

The Court: Very well, next.

Mr. Rein: And the next ground is that since the defendant was arrested as an enemy alien he was entitled to all the rights of a prisoner of war, and, therefore, could not be required to testify.

The Court: I shall deny that. I have already passed on this point on the motion to dismiss prior to the trial.

Mr. Rein: The third ground, that the indictment fails to state an offense since a refusal—

The Court: That is enough. We have argued that before and I overrule that.

Mr. Rein: The fourth ground, that there is insufficient evidence to go to the jury on which a finding of guilty can be had.

The Court: I shall deny the motion on that ground.

Mr. Rein: I would like to state a little more fully my ground on it as I haven't stated it before, Your Honor.

The Court: Yes.

Mr. Rein: One is—

The Court: No, I will not hear argument on that. I have already ruled that the question of wilfulness is a question of fact for the jury.

352 Mr. Rein: I am not talking about wilfulness.

The Court: All right.

Mr. Rein: I am talking about the question of fact that if the defendant refuses to be sworn—

The Court: That has already been argued.

Mr. Rein: I would like to point out that the defendant protested against his arrest; then Representative Thomas stated that the proper time for the defendant to make an objection about his arrest, and make an objection to being sworn, was before being sworn; that Representative Thomas also stated that he did not know what the contents of the statement would be; that the contents of that three-minute statement was directed to his being sworn—

The Court: I have heard enough on that. I think there is enough for the jury. The next ground.

Mr. Rein: The next ground is the failure of the Government to show that the default was wilful.

The Court: I have already ruled that is a question for the jury and not for the Court.

Mr. Rein: The next ground is that since the defendant was brough to the hearing in custody he did not appear voluntarily before the Committee and, therefore, could not be wilfully in default.

The Court: Motion denied.

Mr. Rein: The next ground is on the failure of the
353 Government to prove matters of inquiry on which it wished Mr. Eisler to be sworn and give testimony.

The Court: I shall deny that because I hold that is not an issue in this case in view of the fact that the defendant did not have the right to be informed as to what the questions were going to be if he took the oath.

Mr. Rein: The next ground is that the Committee unlawfully procured the defendant's arrest to assure his appearance before the Committee.

The Court: Denied.

Mr. Rein: The next ground is that the Committee was not interested in securing testimony from the defendant, but was proceeding instead to harass and persecute him for

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his political beliefs and to prevent his departure from the country.

The Court: I shall deny the motion on this ground, with the additional comment that there is no evidence in this case because I have excluded all that.

Mr. Rein: And the final ground that the resolution establishing the House Committee on Un-American Activities is invalid.

The Court: Motion denied.

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354 Mr. Isserman: We request the Court to charge that the intent of the witness to answer or not answer any questions which may have been put to him by the Committee after his being sworn is immaterial to any issue in this case.

The Court: What do you say about that?

Mr. Hitz: I would like to hear that again, Mr. Isserman.

The Court: I am inclined to think it is proper. Read it.

(The statement of counsel was read by the reporter.)

The Court: I think that might have been made by the Government because it is a double-edged sword. I will grant that.

Mr. Isserman: I think that is a proper instruction.

The Court: I have ruled right along that what might have happened after the witness had been sworn was immaterial.

Mr. Isserman: If the Court please, I have drafted it orally and I would like to withdraw it and prepare it in writing because it is our belief that if he did intend to be sworn that goes to a question of good faith, and I am limiting it and amending it to answer any specific questions which might have been put to him by the Committee.

The Court: Denied.

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358 **Argument to the Jury on Behalf of the Defandant.**

Mr. Isserman: May it please the Court and members of the jury: This is the defendant's opportunity, and only opportunity for counsel on his behalf to argue to you that he is not guilty under the charge in the indictment.

The indictment says that he wilfully refused to be sworn and make the oath when he was requested to.

Counsel regrets that the jury was required to sit through a trial which seemed to be prolonged for reasons which apparently, and under the Court's rulings were not concerned with the jury, but under our system of law and under our procedure, when counsel for the defense feels certain matter is relevant and it presents it to the Court, and the Court rules it out then it ceases to be an issue for the jury.

We are inclined to agree with Mr. Hitz when he says that the issues in this case are very narrow and deal with what happened in the hearing room in the few minutes, because it was only a few minutes that Mr. Eisler was there on February 6, 1947, and we say that they are narrow because of the rulings made by the Court which make them narrow.

Now, then, at the outset I believe I should say that
359 whatever Mr. Eisler was going to answer to any specific question about his biography, or about his friends, has nothing to do with this case. We do think that his actions in the hearing room, until he was taken out, has everything to do with this case, and the question before you is whether or not Mr. Eisler wilfully made default.

Before summarizing those few minutes in the hearing room I think it might be well to review what was said about those few minutes in the early part of the trial. You will remember Mr. Hitz in his opening statement said that the defendant had in his hand, that the defendant wanted to read a statement which he had in his hand and was waving around in the air. Mr. Hitz said he would prove that to you. We say that his statement he would prove it is, of course, no proof of what happened. You will recall in the beginning that Mr. Thomas said he had nothing in his hand,

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and then I think Mr. Stripling said he had some papers in his hand, and the defendant himself testified that he had a few sheets of yellow paper similar to this paper I have in my hand here on which he had written a few notes and, of course, there is nothing in the evidence at all which indicated that he was waving any statement, or wanted to read any particular statement at the time he was called.

Now, Mr. Thomas at the beginning said Mr. Eisler made no request to make any statement at the hearing, and Mr. Thomas said that all that Eisler said was "No." He
360 did not even recall that Mr. Eisler had asked for three minutes in which to make a few remarks. Now, I think that is of some significance in this case because actually as we know now, Mr. Thomas later corrected the statement of fact. I think it is significant to understand, or to summarize why Mr. Thomas at the beginning said Mr. Eisler made no request to the Committee and that all that Eisler said was "No," because of the frame of mind of Mr. Thomas, and we say Mr. Thomas had that frame of mind on the morning of February 6 when he was Chairman of the House Committee on Un-American Activities and Mr. Eisler appeared before it, because apparently he treated every statement Mr. Eisler made as if Mr. Eisler would say "No," and because he treated every statement that way in very short order, and not with the deliberate procedure that we know in a courtroom, but in very short order Mr. Eisler was practically rushed off the witness stand.

Later on you will remember on cross examination of Mr. Thomas, because we knew that you, the jury, wanted to know everything that happened that morning, he refreshed his recollection by reading the transcript, and you will remember he said in his opinion the transcript was very, very correct, and that if there was any conflict between his testimony of the day before and what he was reading in the transcript that the transcript really told the story.

Now, I think it is important for us to analyze what
361 story this transcript told. Was it a story of a blanket "no"? Was it a story of a wilful refusal, or

was it a story of a witness who believed he had a right to make an objection, and we will talk more about that in a few minutes, who was trying to make an objection and was not allowed to make it because Mr. Thomas did not know what the objection was but he wouldn't let the witness say what the objection was. In other words, this is a situation of putting Mr. Eisler in a spot where he couldn't make objection, or to make a few remarks to show what the objection was, and I think as we go through this testimony we will show that there was no wilful refusal on Mr. Eisler's part, but rather a wilful refusal of the Committee to take lawful procedure which you, as the jury in this case, have heard taken time and time again; you have heard counsel object before an answer is given. You have heard counsel object before things are done because you know the rule is if you object afterward it is too late. Now, that procedure which was so prevalent in this courtroom indicated that when counsel made an objection it was merely that counsel was trying to get a ruling in his favor on behalf of his client on a particular point, and ordinarily in our procedure when there is a ruling against you you go to the next point.

Now, that kind of procedure was missing that morning in the Committee room, and before going into what actually happened I think it is important to read from the
362 record Mr. Thomas' own words, not the words of our witness but Mr. Thomas' words, that the defendant in this case had a right to make an objection, and what did Mr. Thomas say?

Mr. Hitz: What page?

Mr. Isserman: Here is my question on page 136 of the transcript:

"Mr. Thomas, if a witness wants to object because he believes he has legal reasons why he should not be sworn, how does your committee give him that opportunity under its procedure?"

A simple question, what procedure does the committee have if somebody wants to object.

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"He should certainly, at least, attempt to make some statement as to his legal objections," and then Mr. Thomas goes on to say, "but in this case there was no statement made as to his legal—" and that is where it finishes.

Mr. Thomas said the witness should certainly attempt to state his legal objections.

Now, how did Mr. Thomas know that Mr. Eisler was going to state a legal objection or wasn't going to state a legal objection?

"Do you know what remarks Mr. Eisler was going to make in the three minutes he asked for?"

And on the next page we find Mr. Thomas saying, when the question was read to him which I read to you, "Do you know what remarks Mr. Eisler was going to make in
363 the three minutes he asked for?" Mr. Thomas said:

"When he first asked for the three minutes, no; but—" and there is nothing in this record to show that Mr. Thomas, who was conducting this hearing, knew what the witness was going to say in those three minutes, and if he didn't know what the witness was going to say how could Mr. Thomas know that there was no legal objection going to be made, and remember Mr. Thomas had said, and quite correctly, because it is the fundamental American procedure, that when you think you are being kicked around for anything by anyone that you have a right to object. Maybe that is one of the first things we Americans learn, is the right to object when we think somebody is stepping on our toes. We might be wrong, and the ruling is made against us, but the right to object is fundamental, and so Mr. Thomas was merely stating a very fundamental legal principle, but did he live up to that principle, and we say he did not, because he did not allow Mr. Eisler, the defendant, to say anything until he was sworn. Now, you cannot object to being sworn after you are sworn, it is too late, and yet Mr. Thomas did not give the defendant that right.

Now, Mr. Thomas said he did not know what the remarks were, and we will show that nobody knew what the remarks were because there was no chance to speak them, but there

is evidence in the case exactly as to what the remarks were to be about, and it is in there notwithstanding the
364 strict ruling of the Court which made it impossible for Mr. Eisler to say what he was going to say in those three minutes.

The Court: I think you should not refer to rulings of the Court.

Mr. Isserman: I as sorry, Your Honor.

He said on page 312 of the testimony, in answer to a question which I put on page 311, and my question was as follows:

"Mr. Eisler, why did you ask the Committee for three minutes to make some remarks before you would be sworn on the morning of February 6, 1947?"

"Because I had objection against the whole, what I considered unlawful proceedings of this Committee against my person."

Because I had objection against the whole, what I considered unlawful proceedings of this Committee against my person.

Now, that statement is uncontradicted in this record. Nobody else knew what he wanted to say because no one gave him a chance to say before the Committee what he wanted to say, so this statement that he wanted to state his legal objections before being sworn, in accordance with the Committee procedure which Mr. Thomas has heretofore testified to, was all he wanted to do and he was not allowed to state that objection.

365 Now, I would like to go through the record of that morning as it was read to you, practically read to you by Mr. Thomas from the record: "Mr. Gerhart Eisler, take the stand," and Mr. Eisler said, "I am not going to take the stand."

Now, Mr. Eisler said what his recollection of that is, that he was not going to take the stand until he has made a few remarks. Well, the record does not show, but sometimes there is in the record, as in this case, the names of the two security officers, whose names appear in the record incor-

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rectly and had to be corrected, and in this record we have had to correct the record because stenographers make mistakes as they go along, but there wasn't, and this does not depend on Mr. Eisler's recollection, but the fact is that after he made the statement that he was not going to take the stand, he told him to take it a few minutes after that and I believe his testimony was that he walked over to the witness stand with Mr. Stripling, so whether or not the recollection of Mr. Eisler is correct the fact is that he did take the witness stand at the very beginning of the hearing.

Then the Chairman said, a little further along, "Mr. Eisler, will you raise your right hand?" "Mr. Eisler, will you raise your right hand?" Mr. Eisler said, "No. Before I take the oath—" Now, that is not finished, that sentence. "Before I take the oath," is all he had a chance to say when Mr. Stripling said, "Mr. Chairman," so the witness was in the middle of a sentence. Mr. Stripling
366 ling said, "Mr. Chairman," and then Mr. Eisler said, "I have the floor now." We might have said it differently. We might have said, "I haven't finished the sentence," but he said, "I have the floor," which meant he wanted to make a statement before he took the oath and make a few remarks in connection with my arrest.

Then the Chairman said, "Sit down, Mr. Eisler." And then he said, "Now, Mr. Eisler, you will be sworn in. Raise your right hand."

Mr. Eisler said, "No."

The Chairman said, "Mr. Eisler, in the first place, you want to remember that you are a guest of this Nation," and I presume that referred to the fact that Mr. Eisler came here on a transit visa enroute to Mexico, and for reasons not disclosed here, and I don't go into that; and he said, "I am a political prisoner in the United States."

Now, that may well have been, and undoubtedly was, the beginning of his objection, because counsel in this case has made certain offers of proof in this Court which relate to that problem—

The Court: You may not refer to evidence which was excluded even indirectly by indirection.

Mr. Isserman: Then he said, "I am a political prisoner in the United States" and wanted to go on to state his objection, and then the Chairman said, "Just a minute. Will you please be sworn in?"

367 Mr. Eisler, "You will not swear me in before you hear a few remarks." I would have said, being a lawyer, "I will not be sworn in until I have made my objection," but as long as he made objection, whether he said, "objection" that is the only thing that counted.

Now, the Committee could have found out, and perhaps have avoided this whole trial of days by one question which is significant by its absence because if you knew as jurors, or if I knew as a lawyer he had said, "I have an objection and I want to make a few remarks," the important thing would be, "What are the remarks about?" because he had a right to make that or some other kind of remark, but at no place in this morning, or while Mr. Eisler was in that room, did the Chairman, the secretary, or any committee member try to find out from him by a simple question, "What remarks are you going to make," because if he had been asked that question and been allowed to answer he would have said, "I am making a legal objection to this line of procedure," framed in layman's language because he was not a lawyer, but he was not permitted.

Then the Chairman said, "No; there will be no remarks." He did not say, "What are the remarks," but simply that there will be no remarks, and then Mr. Eisler said, "Then there will be no hearing with me," because he undoubtedly knew he would have to make the objection before the hearing proceeded. If the objection would have been

368 overruled the hearing would have gone on, and he knew that the objection had to be made first, just as in this case, that the objection has to be made first and not afterwards.

The Chairman said, "You refuse to be sworn in? Do you refuse to be sworn in, Mr. Eisler?"

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Mr. Eisler said, "I am ready to answer all questions, to tell my side." You will remember he was under some charge.

The Chairman said, "That is not the question. Do you refuse to be sworn in?"

Mr. Eisler said, "I am ready to answer all questions," and at that point, instead of inquiring to see what the remarks were, to see if Mr. Eisler did want to make an objection, the Chairman said, "Mr. Stripling, call the next witness."

No opportunity, when the Chairman was already calling the next witness, to state a legal objection, and remember Mr. Thomas said the witness had that right. Well, if he had the right he should have been given the opportunity. If they believed he was not going to state a legal objection they should have asked him, "What are you going to state," and while we are on that the State tried to prove, or would have you believe, that Mr. Eisler was going to read a twenty mimeographed paged article in three minutes which he said it would take at least an hour to read, twenty mimeographed pages. I think that is a matter of common knowledge, it would take more than three minutes, or ten minutes,
369 to read that bulky statement. If he had started to read that statement in three minutes, maybe at that point when he was just about finished the first page the Chairman would have stopped him. There is no possibility that Mr. Eisler could have read that statement in three minutes, and remember that statement was finished on February 2nd, even before Mr. Eisler was arrested. It was finished at that point, and on page 18 Mr. Eisler said, "I know that I am speaking under oath. That is why I have been very careful about what I said," but the important point is that he put it in the mimeographed stencil, and was going to give it to the press, and knew that he was making the statement under oath. Certainly it shows he was not going to make that statement in three minutes if he was allowed to make a few remarks, and remember in

the meantime he had been arrested illegally and brought down to Washington under guard even after he had made his arrangements to come, including hotel reservations, and then these things, his arrest happened, and if that had happened to you, or me, or anybody else, you would have boiled with anger inside, and you would have objected at the first opportunity, and this was the first opportunity he had, and Mr. Thomas said he was deprived of that right, and when he is deprived of that, he is, as I see it, being wilfully deprived of his rights, and that it what this case is about. I think Mr. Eisler was deprived of his legal right to
370 make a statement at this hearing. Now, what the purpose of the Committee was in denying that is not important, but the fact that he was denied that simple right was, and is very important here. They admit he should have said to him, "What kind of remarks do you want to make?"

The Court: Mr. Isserman, if this is a convenient time, I want to say that you have five minutes more.

Mr. Isserman: Thank you.

Remember, he had some notes in his mind, and he wanted to make a few remarks, and it was also a sworn statement, but the Committee would not allow him to do it, but this is what he said, "I have never refused to be sworn in," and it was after that point, and he was still on the stand, "I have never refused to be sworn in, I came here as a political prisoner, I want to make a few remarks, only three minutes, before I will be sworn in and answer your questions and make my statement," so that in his mind it was very clear; first the objection, then the swearing in, and then the answering of the questions, and then the making of the statement, and it is all here in this one sentence. Now, that does not show a wilful default but it shows a willingness to reply, simply stating his right to make an objection which would be three minutes, and even if it had taken longer than three minutes it was still his privilege. Now, we say it is the failure to give him that three minutes,

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the failure to allow him to object, the very thing Mr.
371 Thomas said he had a right to do, but he is brought into this courtroom, and there is no one in this courtroom to say, no one in this courtroom, or member of this jury, that if he had been given his legal right to object before being sworn in that he would not have continued on through to the end, and if he had done that he might have been here before you on another charge, but that is what we are concerned with here. Mr. Eisler wanted to object to being sworn. He was not allowed that objection, and it was wrong, wilfully wrong not to have allowed him to make that objection.

We say again that upon these facts there is no wilful default, it was merely something each and every one of you would have done, and we do not blame individuals for standing up for their rights; it is still and always will be a good American principle, and in view of everything you have heard in this case, I am sure you are not going to penalize Mr. Eisler for failure to state an objection which he had a right to make; I think you will not do that.

372 **Closing Argument on Behalf of the United States**

Mr. Hitz: May it please the Court and members of the jury: I had intended to read to you the testimony before the committee, but Mr. Isserman has just read that portion, so it will be unnecessary, and I shall take no more of your time in referring in any detail to that, except to say this: that Mr. Isserman at this time, and Mr. Eisler, and other people who have testified for him, are endeavoring to show that the so-called statement—so-called 3-minute statement—which at times was referred to by Mr. Eisler as "remarks," was in effect not remarks, was not a statement, was not a speech, but was, according to Mr. Eisler and Mr. Isserman, a series of legal objections to the proceedings that were going on—legal objections to Mr. Eisler himself being before that particular committee.

But it is significant that Mr. Eisler, who was represented by counsel at that time, and who had, he says now, but did

not say them, a number of legal objections to the proceedings and to his being there, never said what he was going to say in his statement. He never announced to them that "I feel I have certain rights I have to talk to you about, and I have certain objections to the legality of the proceedings here, which I believe to be unconstitutional," and so on, as he was about to go on here. He did not say that.

He did not use the word "objections." He did not
373 use the words "illegality," "legality," "constitutional," or any of the other words.

So, of course, Mr. Thomas, according to Mr. Isserman, testified here that no attempt was made by Eisler to make any legal objections. He made no legal objections—no attempt—so far as the committee was concerned. It is Mr. Eisler who is putting his word up as to what he intended, as to what he thought was going on, against the word of Mr. Thomas himself, who was conducting the proceedings.

These particular proceedings were very well conducted. The testimony of Mr. Thomas was given carefully; it was that of a moderate, careful, truthful man.

When he was asked a number of questions by Mr. Isserman as to whether this did not take place, and if the record shows that, would he say the record was wrong, Mr. Thomas said, "No, of course I would not. If there is any conflict in my testimony about the proceedings and the record, I will take the record."

We have not heard the words "legality," "constitutional," or "objections"; in fact, the word "remarks," as to what Mr. Eisler stated that he wanted to say to the committee before being sworn, is not consistent with the testimony that took place or the proceedings that took place there, and is not consistent with reference to what it was he had in mind doing, because he later referred to the so-

called remarks as "the statement." He had a state-
374 ment—a 3-minute statement. I think he tried to impress the committee with the fact that what he held in his hand was something that he could read in 3

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minutes. I do not think he had any other statement in mind or in hand or anywhere else.

In addition to that, it was not only referred to as a set of remarks, but in his final refusal to take the stand and to be sworn as a witness, he used the word "speak." I shall read the last several questions that were put to him. This is on page 3.

"The Chairman. I said that I would permit you to make your statement when the committee was through asking questions. After the committee is through asking questions, and your remarks are pertinent to the investigation, why, it will be agreeable to the committee. But first you have to be sworn."

There could be no more moderate, no more tempered statement than that to any witness, no matter whom he may be.

"Mr. Eisler. That is where you are mistaken. I have to do nothing. A political prisoner has to do nothing."

"The Chairman. Then you refuse to be sworn?"

"Mr. Eisler. I do not refuse to be sworn. I want only 3 minutes. Three minutes to make a statement."

He wanted to impose conditions on the conducting of the hearing by Mr. Thomas, who was chairman of that committee.

"The Chairman. We will give you those 3 minutes when you are sworn."

375 "Mr. Eisler. I want to speak before I am sworn."

Do you think he intended there to make any legal objection? He wanted to make a speech, as he was attempting to do several times while he was testifying in this case.

Mr. Isserman: If the Court please, I would like to object to the remarks of the prosecutor on the ground that there has never been in the evidence—

The Court: The objection is noted.

Mr. Hitz: It was with great difficulty that he was stopped at times by me and finally, with great difficulty, by the

Court. I dare say had he started to launch off into reading this 20-page statement here not under oath, or if it were under oath, I do not think anybody could have stopped him, unless those guards from Ellis Island could have done so.

I do not intend further to make reference to the evidence in this case. I can only say that whether or not an objection was made—we say it was not; Mr. Thomas, who was there, said no objection was made—it makes no difference whether it was made or not, because if there is a mistake of law with respect to what a man believes his rights are before one of those committees, it is no defense to the charge of contempt. His Honor will charge you that it makes no difference anyway.

In conclusion, I believe that after you have weighed all the evidence and you have heard the careful presentation of the case by the defense counsel—and they are very
376 able—and the very able summation of the evidence as they saw it, nevertheless your verdict will be a speedy one of guilty, which I am sure you will return with very little hesitation in your jury room; and that you will announce to the world that nobody, no matter who he may feel he is, or where he is from, can be allowed to defy the elected representatives of the American people.

377 **Charge to the Jury**

The Court (HOLTZOFF, J.): Ladies and gentlemen of the jury: As this is the first case in which the members of this panel have participated at this term of court, I am going to make my instructions and my charge to you in considerable detail.

The defendant, Gerhart Eisler, is on trial before this court on a charge that is generally known as contempt of Congress; namely, that he was summoned to testify before a committee of the House of Representatives, that he appeared before that committee but refused to take the oath that is administred to witnesses, and thereby frustrated the desire and the attempt of the committee to obtain tes-

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timony from him. It now becomes your duty to determine whether the defendant is guilty or not guilty of the offense with which he is charged. The only question for you to consider and to determine is whether the defendant is guilty or not guilty of the specific charge on which he is being tried. All other matters that might have crept into this case are extraneous and should be ignored and disregarded by the jury.

At the outset, I want to advise you that the Congress has the power to conduct investigations in order to secure information needed by the Congress in connection with the enactment of legislation. Such investigations may be conducted by the Congress through its committees.
378 Some time ago the House of Representatives created a committee known as the Committee on Un-American Activities. The function of that committee is to investigate un-American propaganda activities. This is a subject which the Congress, through one of its committees, has authority to investigate.

In the course of its investigation, the committee summoned Gerhart Eisler to testify as a witness. The defendant, Eisler, appeared before that committee, and it is charged that when he was called as a witness and directed to take the oath that is administered to all witnesses, he declined to do so and thereby made it impossible for the committee to question him as a witness, and thereby, in the language of the statute, made a willful default.

It is the function of the Court—that is, it is my function and my duty—to instruct the jury as to the law applicable to the case. You are bound and obligated to follow the Court's instructions as to the law. But you, ladies and gentlemen of the jury, are the sole judges of the facts, and you must determine the facts for yourselves solely from the evidence adduced at this trial.

The Court is permitted to discuss the facts and the evidence and to comment on them in order to assist the jury in arriving at its conclusions. But the Court's comments

on the facts and on the evidence are not binding on you, and you need attach to them only such weight as you
379 deem wise and proper. The final decision on the facts is entirely within your domain. My instructions are binding on you only as to the law.

I shall discuss, first, a few of the general principles of law that must bind you and guide you in your deliberations. The fact that a defendant has been indicted and is charged with a crime is not to be taken as an indication of guilt. An indictment is the mere machinery and the procedure by which a defendant is brought before the Court and is placed on trial.

The law is that every defendant in a criminal case is presumed to be innocent. This presumption of innocence attaches to him throughout the trial. The burden of proof is on the Government to prove the defendant guilty beyond a reasonable doubt. Unless the Government sustains this burden and proves beyond a reasonable doubt that the defendant has committed every element of the offense with which he is charged, the jury must find him not guilty.

Now, mark my words. I said that the burden of proof on the Government is to prove the defendant guilty beyond a reasonable doubt—not beyond any doubt whatsoever. The Government has the burden of proving the defendant guilty to a moral certainty and not to an absolute or mathematical certainty.

By a reasonable doubt, as its name implies, is meant a doubt based on reason, a doubt for which you can give a reason to yourself, and not just some whimsical spec-
380 ulation or some capricious conjecture.

The words "proof beyond a reasonable doubt" sometimes seem quite formal, and I like to explain the meaning of that phrase, for this very reason, in simple, everyday phraseology. Proof beyond a reasonable doubt simply means this: If after an impartial comparison and consideration of all the evidence you can say to yourself that you are not satisfied of the defendant's guilt, then

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you have a reasonable doubt. On the other hand, if after such impartial comparison and consideration of all the evidence you can truthfully and candidly say to yourself that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt. In other words, proof beyond a reasonable doubt is such proof as will result on your part in an abiding conviction of the defendant's guilt, such a conclusion as you would be willing to act upon in the more weighty and important matters relating to your own affairs.

In determining whether the Government has established the charge against the defendant beyond a reasonable doubt, you will consider and weigh the testimony of all the witnesses and all of the other evidence in the case, as well as all the circumstances concerning which testimony has been introduced.

You are the sole judges of the credibility of the witnesses.

By that I mean that you, and you alone, are to deter-
381 mine whether to believe any witness and the extent to which any witness should be credited. In reaching a conclusion as to the credibility of any witness and in weighing the testimony of any witness, you may consider the demeanor and the behavior of the witness on the witness stand, the witness' manner of testifying, whether he impresses you as a truth-telling individual, whether the witness impresses you as having an accurate memory and recollection, and whether the witness has any interest in the outcome of this case. All of these matters, as well as any other factors that appear to you as having a bearing on the matter, you may consider and weigh in determining what witnesses to believe and to what extent to credit them.

I shall now pass on to a consideration of the specific charge on which the defendant is being tried. The prosecution in this case is being conducted under a statute known as Section 192 of Title 2 of the United States Code. The

pertinent provisions of this statute are very short and very simple. They read as follows:

"Every person who, having been summoned as a witness, by the authority of either House of Congress, to give testimony upon any matter under inquiry before either House, or any committee of either House, of Congress, wilfully makes default shall be deemed guilty of a misdemeaner."

Refusal to be sworn as a witness after appearing
382 before a committee pursuant to this summons is a default within the meaning of the statute, because refusal to be sworn completely frustrates any desire or attempt of the Congress to procure testimony from the prospective witness. But, as this statute says, this default, in order to be punishable, must be willful.

Now, what is mean by the term "willful"? By the term "willful" is meant merely that the failure or refusal to be sworn—the refusal to take the oath—was not inadvertent, was not accidental, but was deliberate and intentional.

The word "willful" may also mean conduct marked by careless disregard of or plain indifference to the requirements of law. The word "willful" does not mean that the failure or refusal to comply with the order of the committee must necessarily be for an evil purpose or for a bad purpose. The reason or the purpose of the failure to comply, or the reason for the refusal to comply, is immaterial, so long as the refusal was deliberate and intentional and was not a mere inadvertence or an accident.

The questions for the jury to determine are twofold: First, whether the defendant, Eisler, having appeared before a committee of the House of Representatives pursuant to a summons, refused to take the oath which was about to be administered to him as a witness; and, second, whether the defendant's refusal to take the oath was willful, bearing
in mind the definition of the term "willful" that I
383 gave you a few moments ago.

Of course, willfulness cannot be proved directly. Willfulness is a state of mind, and it is impossible to fathom

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the operations of the human mind directly. There is no X-ray machine that can photograph what is going on in the brain of another person. Willfulness may be inferred from circumstances. That is the only way a state of mind can ever be proved. Willfulness may be deduced from the person's conduct, from the things that he does, from the things that he says, as well as from the surrounding circumstances. This question is peculiarly a question of fact for the jury to determine.

In this case it appears that the defendant was requested by the Chairman to take the oath several times, but on each occasion the defendant either refused categorically or refused except on certain conditions, that he specified. The fact that the defendant was given several opportunities to take the oath, but that on each occasion he declined, is a circumstance that the jury may consider in determining whether his default was willful.

As I understand it, the defendant contends that he wanted an opportunity to make a statement concerning his arrest before he was sworn. The law is that a witness does not have the legal right to dictate the conditions on which he will or will not take the oath as a witness, or the conditions on which he will or will not testify. Even if the
384 defendant believed or was advised that he could refuse to be sworn and to testify except on his own terms, this fact is no defense. A mistaken view of the law does not excuse the defendant and is no defense in this case.

To summarize my instructions to you, I may say this: If you find that the defendant, Gerhart Eisler, having appeared before the House Committee on Un-American Activities pursuant to subpoena or summons, refused to take the oath to be administered to him as a witness, and if you further find that his refusal to do so was willful, you may bring in a verdict of guilty. Of course, if you find otherwise, your verdict should be not guilty.

Now, as I said to you in the opening of my remarks, ladies and gentlemen of the jury, my discussion of the evi-

dence is not binding on you. If my recollection or my understanding does not accord with your recollection or understanding of the testimony, then your recollection and your understanding must prevail, because you are the sole judges of the facts, and my discussion of the evidence is not binding on you.

I want you to take this matter and to consider it carefully and deliberately in the light of the instructions which I have given you. This is a simple case, ladies and gentlemen of the jury. Use the same ordinary common sense, the same practical approach, and the same ordinary intelligence which you would employ in determining any other important matter that you have occasion to decide in the course of your own everyday life.

The verdict of the jury must be reached by a unanimous vote, and each juror must concur in the verdict. Your verdict should be either guilty or not guilty.

Are there any exceptions, gentlemen? If so, you may state them at the bench.

(Counsel for both sides approached the bench, and the following occurred:)

Mr. Isserman: In behalf of the defendant, I desire to object to the following directions to the jury made by the Court: The Court's statement to the effect that refusal to be sworn is a default under the statute; secondly, the Court's definition of the term "willful" and the Court's explanation of that term in every respect. I might say that the last two objections are based upon the ground that we believe it to be an incorrect statement of the law.

The Court: You do not have to explain why you object.

Mr. Isserman: I understood we had to state each ground.

The Court: No; just note your exceptions.

Mr. Isserman: To the Court's statement that the defendant was requested to be sworn on several occasions and that on each occasion he either refused or refused on certain conditions, which he imposed. We believe that to be an incorrect summary of the facts.

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386 To the Court's statement to the effect that the defendant wanted an opportunity to make a statement concerning his arrest before being sworn, on the ground that that is an incorrect statement of the facts.

To the Court's statement to the effect that the law is that a defendant has no right to state conditions, without adding thereto that the defendant did have a right to make a legal objection to being sworn.

If the Court please, may Mrs. King state an objection she has noted?

The Court: Yes.

Mrs. King: If the Court please, we object to the instruction—

The Court: Just a moment. You will have to talk in an undertone, so that the jury cannot hear you.

Mrs. King: We object to the instruction that the Committee on Un-American Activities had a right to investigate un-American propaganda activities, upon the ground—

The Court: Do not state your ground; just state your objection; we cannot hear argument on objections.

Mrs. King: That his refusal to be sworn made it impossible for the committee to question him.

Mr. Isserman: Mr. Rein has one objection he has noted, your Honor.

The Court: Of course, the general rule is that
387 only one counsel makes objections. But go ahead.

Mr. Rein: One brief one, your Honor. I would like to note an exception to the Court's statement that it is the defendant's contention that a witness has the right to state the conditions on which he would testify before the committee.

The Court: I do not think that is a correct statement of what I said. If it is, your exception is noted.

Mr. Hitz: Your Honor, I have one remark only, and this concerns the defense. Mr. Isserman said that he objected to a statement by the Court that it was Eisler's intention to make certain preliminary remarks in a statement concerning his arrest and internment, so called. I agree

that perhaps there is an intimation here that more than that would have been said, so I would have no objection, if the Court saw fit to do so, to saying: and to make other legal statements, or rather statements, to the committee with respect to his appearance there.

The Court: Well, I based my statement on the portion of the testimony to which Mr. Isserman directed my attention this morning, namely, that Mr. Eisler said that he wanted to state objections concerning his arrest. I do not recall the page number.

Mr. Isserman: I would like to give your Honor the specific page reference.

The Court: Yes; do you have it?

Mr. Isserman: Page 312.

388 The Court: The question by Mr. Isserman was:

"Mr. Eisler, why did you ask the committee for 3 minutes to make some remarks before you would be sworn on the morning of February 6?"

"Answer. Because I had objection against the whole, what I considered, unlawful proceedings of this committee against my person."

I think that is broader than what I said concerning his arrest. I think I will charge the words "arrest and unlawful proceedings."

Mr. Isserman: Would your Honor add: before the committee?

The Court: Oh, yes. I will read this answer.

Mr. Hitz: And to that would be, of course, added the same instruction that it makes no difference?

The Court: Yes, of course.

Mr. Isserman: We would like to enter an objection to the charge as a whole.

The Court: There is no such thing. You may enter it; it is of no value.

Mr. Isserman: I would like to object also to that portion of the charge that states that the defendant was present in

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response to a subpoena. I believe your Honor charged that.

The Court: Very well.

(Counsel returned to the trial table, and the fol-
389 lowing occurred:)

The Court: Ladies and gentlemen: I am going to expand one little statement that I made to you. I have stated that the defendant contends that he wanted an opportunity to make a statement concerning his arrest. In order that there may be no ambiguity, I am going to read to you what the defendant said on the witness stand concerning this matter.

Mr. Hitz: That is, in this proceeding he said it.

The Court: Yes.

He was asked:

"Why did you ask the committee for 3 minutes to make some remarks before you would be sworn on the morning of February 6?"

His answer was on this witness stand:

"Because I had objection against the whole, what I considered, unlawful proceedings of this committee against my person."

This states his contention in his own words; but I want to repeat again that a witness does not have the legal right to dictate the conditions on which he will or will not testify, or to insist on making a statement as a condition of taking the oath as a witness.

Mr. Isserman: If the Court please, may I approach the bench?

The Court: You except to that; it may be noted.

390 Mr. Isserman: I am excepting to that latter portion.

The Court: Yes; that may be noted.

* * * * * * * * * *

395 **Defendant's Requests to Charge**

1. If the defendant was advised by counsel and believed that he was entitled to object to the procedure to which he was subjected his refusal to be sworn until he had had an opportunity to make a statement did not constitute the wilfulness required by the statute under which he was indicted.

Denied. A. H.

2. The jury in considering whether the defendant wilfully made default should consider all the facts and circumstances under which the defendant was brought to Washington before the Committee on Un-American Activities.

Denied. A. H.

3. The jury in considering whether the defendant wilfully made default should consider all the facts and circumstances under which the defendant appeared in Washington before the Committee on Un-American Activities.

Denied. A. H.

4. In determining whether the defendant wilfully made default the jury must acquit the defendant unless they believe he had an evil purpose and intent in refusing to be sworn.

Denied. A. H.

396 5. The jury must acquit the defendant unless they are convinced beyond a reasonable doubt that he wilfully made default.

Granted in substance. A. H.

6. The jury are the sole judges of whether the defendant wilfully made default and must acquit the defendant unless they are convinced beyond a reasonable doubt that his refusal to be sworn was for the purpose and with the intent of interfering with the investigation of the Committee on Un-American Activities.

Denied. A. H.

7. The jury must acquit the defendant unless they are convinced beyond a reasonable doubt that the refusal of the defendant to be sworn was not due to an honest belief that the procedure to which he was subjected was unlawful.

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Denied. A. H.

8. The jury must acquit the defendant unless they are convinced beyond a reasonable doubt that the defendant was unwilling to be sworn and testify after he had made a three minute statement.

Denied. A. H.

9. The jury must acquit the defendant unless they find beyond a reasonable doubt that the defendant had a premeditated and deliberate design to refuse to testify before the Committee.

Denied. A. H.

397 10. The jury must acquit the defendant if they find that he was willing to be sworn and testify after he had made a three minute statement.

Denied. A. H.

11. The jury must acquit the defendant unless they find beyond a reasonable doubt that his request to make a three minute statement did not arise from the circumstances of his being brought before the Committee in custody.

Denied. A. H.

12. Wilfully in this case means with a bad purpose and evil intent.

Denied. A. H.

13. To find that the defendant acted wilfully in this case the jury must find beyond a reasonable doubt the defendant's conduct was a result of a premeditated and deliberate plan to refuse to testify before the Committee.

Denied. A. H.

14. In order to find the defendant guilty the jury must find that the defendant refused to testify after being given a full opportunity by the Committee to state his objections to the circumstances of his arrest.

Denied. A. H.

15. If the jury finds that the only issue in controversy between the defendant and the Committee was one of procedure; whether he should make a three minute statement before or after he was sworn, then they must return

398 a verdict of acquittal.

Denied. A. H.

16. If the jury finds that the defendant's conduct was the result of an honest belief of his rights before the Committee, whether such belief was legally correct or not, then they must return a verdict of acquittal.

Denied. A. H.

17. The jury must acquit the defendant unless they are convinced beyond a reasonable doubt that he would have refused to testify under oath after having objected to the proceedings against him by the Un-American Activities Committee.

Denied. A. H.

18. The jury must acquit the defendant unless they are convinced beyond a reasonabl doubt that he would have refused to testify under oath after he had objected to being sworn.

Denied. A. H.

19. If the jury find that the defendant before he was sworn desired and attempted to make objection to the Committee's power to swear him you must acquit the defendant.

Denied. A. H.

20. If the jury find that the defendant before he was sworn desired and attempted to make objection to the right of the Committee to question him under the circumstances which existed on February 6, 1946, you must acquit the defendant.

Denied. A. H.

399 21. The jury must acquit the defendant unless they are convinced beyond a reasonable doubt that he would have refused to testify under oath after having objected to his arrest, detention and transportation which believed to be unlawful and procured by the Committee.

Denied. A. H.

22. If you believe from the evidence that the defendant did not come voluntarily to the hearing before the Un-American Activities Committee on February 6, 1947, you must acquit the defendant.

Denied. A. H.

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23. If you believe from the evidence that the defendant did not come to the hearing before the Un-American Activities Committee on February 6, 1947, under and in pursuance of the subpoena theretofore served upon him you must acquit the defendant.

Denied. A. H.

24. The fact that this defendant has been indicted is no evidence that he has committed the offense with which he is charged.

Granted. A. H.

25. The fact that the Government is the prosecutor and asks that a man be convicted is of no consequence. When the Government becomes a litigant in the Federal courts, its right is no greater than that of the most humble
400 person in all the land.

Denied. A. H.

26. Each juror must be convinced in his own mind beyond a reasonable doubt of the defendant's guilt.

Denied. A. H.

27. No juror must be swayed if he has a reasonable doubt, by the mere fact that a majority of the jurors are convinced of the guilt of the defendant.

Denied. A. H.

28. If you find that under Committee procedure the defendant before being sworn had a right to object to being sworn and was attempting to make such objection when he was dismissed, you must acquit the defendant.

Denied. A. H.

29. It was the Committee procedure to allow a witness before being sworn to state any objection to being sworn. If you find that the defendant was attempting to state such objections before he would take the oath you must acquit the defendant.

Denied. A. H.

30. The fact that counsel for the defendant was present in the hearing room and remained silent did not prevent the witness from himself making objection to being sworn.

Denied. A. H.

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Argument on Motions in Arrest of Judgment and for New Trial.

403 Mr. Rein: The motion to arrest judgment we would make first. We have two grounds for that motion. One is that the indictment does not state an offense against the United States. The second is that the statute and the resolution setting up the House Committee on Un-American Activities are unconstitutional. I believe Your Honor is familiar with the arguments in that matter, and unless you wish to hear further argument—

The Court: I do not think I would encumber counsel, because those points were argued before me in full, and I am going to adhere to my rulings. I will deny the motion.

Mr. Rein: Thank you, Your Honor.

On the motion for a new trial, we have a memorandum which I believe will assist Your Honor in following our oral argument on that motion.

404 The Court: Very well.

Mr. Rein: We wish to divide our argument on that motion, Your Honor, among counsel. Mrs. Carol King will proceed on the first point in the memorandum.

The Court: Very well.

Mrs. King: If Your Honor please, the defendant urges very strongly that an erroneous determination was made on his affidavit to disqualify the Court on the basis of bias and prejudice. The opinion of this Court on that question took up three matters.

In the first place, the Court said that the affidavit was not timely. On that issue we contend that the affidavit was timely; that the trial judge was not assigned, as far as defense counsel knew, until the 20th day of May; that on that day the defendant consulted with Abraham J. Isserman, who he knew was going to be his trial attorney, and it was arranged that Mr. Isserman would consult defense counsel in Washington on the 23rd of May; that on the 23rd day of May, due to the death of Mr. Isserman's brother, it was impossible for him to consult with counsel, and he became unavailable until May 27, and on that day there was a conference of defense attorneys, and on the following day

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the affidavit of bias and prejudice was forwarded from New York to Washington on the 29th of May.

On the second point, the Court ruled that the affidavit was insufficient. Upon that issue, in view of the Court's
405 ruling that the affidavit in the Barsky case was similar, and in view of the Court of Appeals granting a mandamus in the Barsky case, we believe that this constitutes a ruling as to the sufficiency of the affidavit in the case at bar.

On the third question—that is, that the certificate attached to the affidavit was not made by counsel—was not signed by counsel—of record, and, in fact, was signed by signed by myself, Carol King, it is our contention that this was signed by counsel of record; that on the 22nd of April I appeared in the District Court in the District of Columbia before Chief Justice Laws and at that time was admitted to practice for the purpose of this case and on that day filed a notice of appearance in this case; that Your Honor should take judicial notice of the records of this court; and that there has never been a ruling, as far as I know, that a person who is recognized for the purposes of a case is not counsel of record—and there certainly has not been one in connection with an application to disqualify for bias and prejudice.

Therefore, at this time, in view of the expense that would be involved in taking an appeal in this case, we ask that a new trial be granted on the ground that there was an improper disposition of the affidavit of bias and prejudice.

In the Barsky case, it is our understanding that there was a time when this Court ruled that it was unnecessary to sue out a mandamus, in view of the fact that the
406 matter could be reviewed on appeal. It is our contention that in view of the length of the trial and the fact that the defendant is not a man of great means, it works a hardship upon him, and it is unnecessary, as the Court of Appeals has virtually ruled on the affidavit of bias and prejudice; and on that ground we urge that a new trial be granted.

Mr. Isserman: If the Court please, our second contention in respect to the motion that a new trial should be granted is based on the fact that throughout the trial, and for whatever reason, a situation was created in which the trial court by its rulings indicated that it favored the Government and was prejudiced against the defendant. We are not saying in this motion that there was any intention on the part of the trial court in that respect; we do say that a study of the record discloses that there were a number of types of situations in which the action of the Court had the effect of prejudicing the case of the defendant before the jury.

We think there were examples of this kind of incident in the method of putting questions to the jurors and in rulings that counsel for the defendants could not object before a Government witness had completed his answer, though such conduct was permitted Government counsel and indulged in by the Court when defense witnesses were on the stand or when defense counsel was engaged in cross-examination.

We think, too, that the Court in reprimanding de-
407 fense counsel on a number of occasions, and, as we believe, without cause, and within the presence of the jury, created an atmosphere in which it was difficult, if not impossible, for the jury to consider the matter on the facts which were before it. We consider also from the record of the case that the Court, again without charging the Court with any motive, did obstruct defense counsel in the matter of presentation of matters to the Court and jury. We say also that the imposition of numerous objections to defense testimony, not raised by Government counsel, and undue cross-examination of the defendant by the Court, and permitting Government counsel to do so, contributed to the situation.

We say, too, that perhaps if each item is considered individually, not all of them in themselves would warrant the granting of a new trial; but we do say, in accordance with the principle laid down in some of the cases which are cited

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in our memorandum, that the sum total of the incidents which occurred, whether or not each specific one was ground for reversal, created that atmosphere, which under the rules laid down in the Canons of Judicial Ethics and in the cases, prejudiced the defendant's case.

Of course, it is difficult to determine whether or not the jury was in fact prejudiced; but the courts hold it sufficient if the atmosphere which is created is one in which the jury might possibly have been prejudiced from a study of
408 the record as it appears.

Now, I say, too, that unfortunately in the colloquies between the Court and defense counsel there somehow or other crept in at the trial a display of feeling, as indicated by the actual remarks made back and forth and, if they were capable of reproduction, even by the tone of counsel and the Court.

Now, under the cases it is not even necessary to determine whether counsel was at fault, as the Court at times indicated, because of his apparent appearance of discourtesy, in the Court's view, or whether the Court, for whatever reason, was at fault in not preventing these colloquies and displays of feeling. But we say the fact that they existed, and we say that the numerous incidents indicated by the record show that they did exist, warrants that the defendant in this case, under the difficult circumstances of his relationships which were developed during the trial, and the difficult circumstances which exist in respect to the problem of a communist alien being tried in this period—we say that all of these matters considered together would require a trial in which every care was taken, in which no incident appeared with might possibly be considered as affecting the judgment of the jury.

I should like to spend a little time in going into the
409 types of incidents which we consider are the ones that the Court should now consider in this motion for a new trial.

The Court: I have been reading these excerpts. I have just finished reading them, so you do not have to discuss them in extenso.

Mr. Isserman: Well, I should like to do so; but if the Court suggests that I should not—

The Court: Well, you may if you wish; this is only a suggestion.

Mr. Isserman: Well, I should like to say this, Your Honor: We spent considerable time in studying the record, and we were careful in trying to select those incidents which we believed illustrated the points we would like to make. We do hope that the Court will give them the full consideration they deserve, because, as Mrs. King pointed out, it would be a needless expense, with needless time wasted by the Government and by Government counsel and defense counsel, if the defendant were put to the expense of an appeal when, for many reasons, a new trial would obviate many of the points which are now subject to appeal before the appellate court.

In going into all the incidents, I should like to discuss the problem which arose and which continued throughout the trial of the Court's rulings in respect to the questions put by counsel to witnesses. The Court made clear to defense counsel on a number of occasions, and quite emphatically, that a witness who was testifying—and this
410 was without regard to whether his answer was responsive—would be allowed to continue his answer without objection by defense counsel, and that defense counsel would have to wait until the witness finished, no matter how long his answer might be. This occurred particularly, and I believe for the first time, as this record shows, in the case of Congressman Parnell Thomas, when he was on the stand. I refer to the matter which starts on page 7 of our memorandum and goes on from there.

When in the course of that examination, as the Court will recall, Mr. Thomas, when asked for a specific answer on something to justify a statement he had made, started to

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read the record. Counsel then desired to make the objection that the reading of this record, which was not in evidence, was improper, and the Court said:

"The Court will inform counsel again that in this court it is not the practice to note objections in the middle of a witness' answer."

At that point counsel had called the attention of Congressman Thomas to a statement that he had testified to the day before, which was that "Mr. Eisler replied that he would not testify." That is what Mr. Thomas said Mr. Eisler had said at the hearing before the committee.

Defense counsel then asked Mr. Thomas to point out in the transcript of the committee hearing where this statement appeared. The witness, over objection and
411 protected by the Court's ruling, read at length from the transcript. Whether or not that would have been stricken, the fact is that this record, which later the Court excluded, was read to the jury by the witness while counsel was objecting, or without giving counsel an opportunity to object.

The Court: I recall that incident, and my final ruling was that in view of the nature of the question propounded by counsel, the answer was responsive.

Mr. Isserman: We know that the Court ruled that way; and we also point out that even before the witness had finished, the Court had said that the answer of the witness was entirely responsive. Then, when we made our motion to strike, that motion was denied.

The Court: That is just a question of whether there was an error of law in my ruling.

Mr. Isserman: It is true that it is a question of an error of law, which in itself, in our opinion, would warrant a new trial on the second aspect or point we are arguing at this time.

On the other hand, when the defendant was on the stand—and I might say this example of Mr. Thomas is one of several that we quote, where counsel was not allowed

to make what counsel believed was a timely objection—when the defendant was on the stand, a different conduct was afforded. On one occasion Mr. Hitz said to the defendant:

412 "Did counsel advise you as to these rights?"

There was an answer by the defendant: "Yes, counsel advised me—"

And the record indicates he did not finish. Mr. Hitz said:

"I am sorry, you have answered the question."

The Court said:

"Just answer yes or no."

The question that was asked of Mr. Thomas on at least one occasion was designed to elicit exactly the same yes or no answer, as we show in our memorandum; but there the Court allowed Mr. Thomas to finish, even though the matter he gave was irrelevant. But in the case of the defendant, when he was testifying, this rule of allowing the witness to finish his answer did not work.

Not only was that done by Government counsel but also by the Court. For instance, I think this is fairly illustrative. Mr. Isserman asked a question as follows:

"Mr. Thomas has testified at this trial, Mr. Eisler, that after you were asked to take the stand you said, 'I am not going to take the stand,' and I ask you now whether you made that statement?"

The answer was: "Yes, it was the first part of the statement which I was not able to answer because I was interrupted."

413 Then I asked: "What is the second part?"

The Witness got as far as to say: "I wanted to say—" when the Court said:

"No, you have answered the question."

My question was: "What is the second part?"

The witness spoke a few words, "I wanted to say"; and the Court said, "No, you have answered the question."

Another time, in discussing the question of a Mexican passport, the witness said:

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"Yes, I had a Mexican substitute passport, because I was invited—"

The Court said:

"Just a minute, you have answered the question. You need not go over these details because they are irrelevant. You have shown he was here on a transit visa to Mexico. That is enough."

Mr. Isserman said:

"I would like to proceed if I may."

The Court said: "Ask the next question."

Again, while this single incident may not by itself be a matter for reversal, it is part of a series of incidents which indicate the difference in treatment which was accorded, which was bound to be noticed by the jury, as it was by defense counsel, and which certainly would indicate to the jury that there was an atmosphere not of complete impartiality.

414 Now, much more significant is the fact that throughout the trial the Court in its remarks to defense counsel clearly, in our opinion, overstepped the bounds permitted by the Canons of Ethics and by the cases. As I pointed out, under the cases it is the effect of these remarks on the jury which is important.

The Court: Personal remarks to counsel, admonitions to counsel, were made at a bench conference. The Court called counsel to the bench and gave an admonition to counsel at a bench conference out of the hearing of the jury.

Mr. Isserman: That was true in one case; and in that case, if Your Honor will recall—and we refer to it here—the Court did say, as we point out, that if counsel was not careful—and there was a warning being given—the next time the rebuke might be made in the presence of the jury.

The Court: Because it seemed to the Court that counsel's manner was not that to which the Court was accustomed from other members of the bar.

Mr. Isserman: We are not now arguing, although our own summary of the record would indicate that for some

reason—and I am free to confess I do not know why—the Court seemed to have developed an animus toward defense counsel—

The Court: No, the Court has no animus toward defense counsel whatever. The Court wants to assure counsel that there is no animus toward counsel personally. But
415 the Court does exact courtesy and urbanity from all members of the bar. It is not a matter of feeling or animus at all. It seemed to the court that those bounds were transcended by counsel for the defendant. The Court was not sure whether the custom and usage in counsel's own jurisdiction was different and for that reason hesitated to call attention to the fact in open court and so called counsel to the bench.

Mr. Isserman: I should like to go back a minute to the bench conference that your Honor has alluded to. The point I should like to make is that while the Court did say at that bench conference that thereafter a rebuke might be made in the presence of the jury, we say the record shows that rebukes—not the particular rebuke, but other rebukes—were made before and after that particular bench conference and in the presence of the jury. We say that there is no circumstance, as far as we understand the cases, in which a defendant can be punished before the jury by rebuking his counsel in the jury's presence.

The Court: If counsel oversteps the bounds, I think the Court has a right to check counsel. It is unfortunate that the defendant suffers. But in this particular case the Court took care to explain to counsel at the bench conference the type of conduct and the type of manner that was expected.

Mr. Isserman: If the Court will remember, and as the record shows, defense counsel indicated his intention
416 to be urbane and courteous to the Court.

The Court: Oh, yes; there is no doubt about that. The Court has no feeling that counsel intended to be discourteous; but, after all, the Court can only judge by counsel's actions and cannot read the workings of his mind.

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Mr. Isserman: Well, I agree with Your Honor that this was unprovoked; and our study of the record indicates there were a great many instances in which it would seem that counsel had not acted in a provocative manner to the Court.

The Court: Those matters do not appear in the record because, to some extent, they involved brusqueness of tone and matters of that kind.

You may proceed. I have read your memorandum.

Mr. Isserman: I should like to call Your Honor's attention to our viewpoint of it, which does seem to differ from the Court's.

The Court: I beg your pardon? I did not understand.

Mr. Isserman: I should like to refer to a few incidents which indicate the basis of our viewpoint.

The Court: I have read them. I suggest you make it brief.

Mr. Isserman: I will try to, if the Court please. In the early part of the record, pages 103-105, counsel was cross-examining the witness Stripling, and at one point the Court said:

417 "I think that is minutiae and is immaterial, because the charge against the defendant is that he declined to take the oath. What chair he was sitting in or whether he was seated or standing is, I think, immaterial. I suggest to counsel that the interrogation be directed to the charge in the indictment."

Counsel was about to say something when the Court said: "Do not argue. I made a suggestion. Proceed to the next question."

But the Court had not ruled out the previous question, and counsel was obliged to say:

"I would like to have an answer to the question I just put."

Then the reporter read the question, and the proceeding continued. The Court's frequent reference to minutiae and the Court's rebukes to defense counsel not to argue or to

stop anybody created the atmosphere of which we complain.

The Court: Well, I think that is in the realm of trivia.

Mr. Isserman: Now, another incident occurred which we think is typical. In one situation—record, 125—counsel asked that a remark made by Congressman Thomas be stricken as not being responsive.

The Court said:

"It may be stricken. Just state your motion; do not argue."

418 Counsel had not argued; counsel had merely stated the grounds. Only a few minutes after this took place, the following took place:

Counsel has asked: "Now, Mr. Thomas, you were reading from a transcript of the hearing, were you not?"

Mr. Thomas: "That is correct."

Mr. Isserman: "Have you read all the questions and answers which deal with Mr. Eisler's refusal to be sworn?"

Mr. Thomas answered:

"Up to that point. I shall be glad to continue."

Mr. Isserman said: "Just a moment; you will get an opportunity to continue."

The Court said: "Do not argue with the witness."

Counsel said: "Well, the witness was remonstrating with counsel. I asked that he be admonished to answer the question."

The Court said: "I suggest to counsel that he proceed as counsel should."

Then counsel said: "I wish to make objection to Your Honor's remark and ask that it be stricken."

The Court said: "Motion denied. Counsel's function on cross-examination of a witness is solely to ask questions and not to remonstrate with the witness. Now, proceed and ask the next question."

Then, I think, at one time the Court said counsel
419 ought to know how to make an offer of proof—a brief statement of that kind made in the presence of the jury. Under the cases, it is clear that the Court may not,

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in rebuking counsel, in condemning counsel's action on behalf of his client, create a situation which we say was created in this case: that counsel was inept, that the Court was displeased with counsel, for it certainly had its effect on the jury; it could not be otherwise.

Then, there was a very long colloquy in a bench conference, that Your Honor talked about.

In another instance, the difficulty counsel had did not, we believe, stem from counsel's actions. Counsel was trying to identify a telegram sent to John F. McGohey by the Attorney General. Counsel had got as far as to say:

"May I have the telegram dated April 12, 1947, addressed to the Honorable John F. McGohey, United States District Attorney, U. S. Courthouse, New York, signed—"

The Court then interrupted. Counsel was about to state who signed the telegram. The Court said:

"Don't go into all those details."

Counsel said: "I want to identify the telegram."

The Court said: "Just identify it briefly."

Counsel said: "I am going to give the—"

What would have followed was the signature.

The Court said: "Don't tell me that, just identify
420 it briefly."

Counsel said: "I am trying to do as Your Honor tells me."

The Court said: "The Court has the last word."

But counsel was still obliged to complete identification and said:

"I shall complete the identification by indicating that it is signed by Tom C. Clark, Attorney General."

The Court: Yes. It seemed to the Court that counsel in a number of cases in identifying documents was doing it in such a way as to disclose a part of its contents instead of just saying, "The telegram from so and so to so and so dated such and such a date." That was the impression it made upon the Court.

Mr. Isserman: The fact is that counsel did what was directed by the Court.

The Court: Proceed.

Mr. Isserman: Now, another example of the Court's impatience with counsel, which we believe was not soundly based on counsel's actions, occurred when counsel asked Mr. McInerney the question:

"Mr. McInerney, I now ask you whether or not defendant Gerhart Eisler from his arrival in the United States in June, 1941, applied for any change of status from his status as to being here on a transit visa, up to and including February 4, 1947?"

421 There was objection, and the objection was sustained.

Counsel then said: "I offer to prove that this witness, if allowed to answer, would state that the defendant Gerhart Eisler never applied for change in status."

The Court said: "Well, you mean you expect him to say no. That is the offer of proof."

Counsel said: "No."

The Court said: "Because your question calls for a yes or no answer."

At that time there was no conflict, and the Court insisted that the question called for a yes or no answer. Even now, when you read the question, it is clear that it did not.

Then, the Court said: "You ought to know how to make an offer of proof"—which was a rebuke in the presence of the jury.

Counsel then asked the reporter to repeat the question. The Court's remark then made was one that counsel had never heard before in the many jurisdictions in which he had tried cases: "The Court. You may do it this time but don't do it again. You ought to know your own question."

Invariably it has been the practice in courts in which I have appeared—in fact, it is counsel's right—to have the reporter repeat the question, because after colloquy no one can be expected to remember the exact question he

422 had put 3 minutes before.

Now, in the same colloquy the Court said:

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"I still say the question calls for a yes or no answer. I think you are wasting time unnecessarily and I sustain the objection."

On that point there was no objection that was before the Court.

In the same colloquy, when counsel objected to the Court's remarks, the Court said:

"The Court never strikes its own remarks."

Well, that may be the practice, but, as we point out in our memorandum, the Cyclopedia of Federal Procedure says that when an error is called to the attention of the Court, it "ordinarily is cured by the act of the judge in withdrawing it and ordering it stricken out."

It is not only that counsel felt that there was a display of feeling between Court and counsel, which we believe was carried over to the jury; but also we believe the defendant's rights, as far as his counsel's right to cross-examine without interruption is concerned, was seriously curtailed by rulings of the Court. The Court seemed to be impatient. At page 118 of the record, the Court said.

"I do not want any time consumed on matters of stipulation."

Again, on page 119 of the record, the Court said:

423 "That question is excluded because that matter has been stipulated. Ask the next question."

The Court: Yes. The Court felt that after it had excluded certain types of evidence, there was an accumulation of offers of the same type of evidence when the defendant's rights were fully protected by a single offer and a ruling on that offer.

Mr. Isserman: I might say as to the point in question that counsel was cross-examining on quite another point.

The Court: You may proceed. Is there anything else on that point, Mr. Isserman?

Mr. Isserman: Yes, there are a number of things.

The Court: Well, as I said when this argument commenced, I have read all these excerpts that you have quoted. I have been reading them at the bench here.

Mr. Isserman: I should like to call attention to one or two more incidents here, without going into all of them.

The Court: I beg your pardon?

Mr. Isserman: I should like to call attention to one or two more incidents.

On page 18 of our memorandum reference is made to the situation in which the Government sought without proper foundation to introduce a copy of the transcript of the hearing of February 6. Defense counsel objected because
the transcript contained irrelevant material and no
424 foundation had been laid for its introduction. The
objection was essential to prevent irrelevant and possibly damaging material from reaching the jury. It was not made captiously. In sustaining the defense objection, the Court indicated to the jury that defense counsel was being technical and was obstructing the trial in that the transcript, if it were in evidence, "would be helpful." So the Court then excluded the evidence on an alleged technicality made by counsel and stated in the presence of the jury that this evidence if it had gone in would have been helpful; if evidence is excluded, it is not helpful and cannot be helpful.

The Court: The Court's view on that was this, Mr. Isserman: You had the witness Thomas read pertinent portions of the transcript. Then Mr. Hitz offered the transcript in evidence. It seemed to me that it was tweedledum and tweedledee whether the actual manuscript was in evidence, when in answer to your own questions pertinent portions of the transcript had been read.

Mr. Isserman: When the Court said in the presence of the jury in sustaining the objection that the objection "does not amount to anything," it would seem to me that that was a characterization of counsel's work and of the evidence, which was certainly prejudicial.

Now, with respect to bench conferences, the Court will
remember that at one point the defendant had asked
425 that he be allowed to be present at bench confer-

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ences. The Court ruled that he could not be, but that motions could be made from counsel table, except certain ones dealing with offers of proof. Then, at one point the following occurred, which indicated again an impatience on the part of the Court, remarks that seemed to indicate that counsel was to be punished in the presence of the jury. At one time after this colloquy at the bench the Court refused to allow defense counsel to make certain offers of proof.

The Court: I take the position that offers of proof are not necessary—and I so explained—to protect a party's right if the Court holds that the entire subject matter of the inquiry is irrelevant. It is necessary to make an offer of proof in order to preserve your rights only if the question of the admissibility depends on the nature of the answer. Then it is, of course, necessary to make an offer of proof. But I indicated several times that I deemed the defendant's rights to be sufficiently protected by asking the question. I ruled out the subject matter of the question as being irrelevant and that, therefore, an offer of proof was not necessary to protect the defendant's rights.

Mr. Isserman: I am not directing myself to the law in that respect. We concede that some of Your Honor's rulings on offers of proof were proper. But we are talking now of the treatment accorded counsel.

426 When the Court had refused counsel the opportunity to make an offer of proof from the courtroom, and when counsel then offered to approach the bench, the Court said:

"No; in the light of the statement made by defense counsel I will not allow that."

This was in the presence of the jury.

"You stated at the last bench conference that you preferred everything done in open court; that your client objected to having things done at the bench that he could not hear. I informed you that the only purpose of a bench conference is to protect the defendant. Now, you may not change back and forth."

Counsel answered: "I am not trying to change, if Your Honor please, but I believe an offer of proof is necessary in this case, and if we cannot make it in open court, we should like to make it at the bench, although I believe—"

And the Court said no, it could not be made either in open court or at the bench.

We believe this type of rebuke, along with the others, undoubtedly had its effect upon the jury when it considered the facts.

The Court: I think perhaps you have discussed that point sufficiently.

Mr. Isserman: We would ask the Court, in view of the Court's statement that the Court has heard enough
427 of the examples, to consider all of the examples.

The Court: Well, I have read them at the bench since this argument commenced. I may say that you and your associates have been speaking for about 35 minutes. That has been more than enough time for me to read this.

Mr. Isserman: I should like to say in conclusion that the sum total of the specific incidents which we have set forth indicates that the trial court in substantial manner violated the Canons of Judicial Ethics and the principles laid down by the cases governing the conduct of trial courts.

The Court: I suggest that you confine yourself to the law and not tell me that the Court violated judicial ethics. I think the Court is a better judge of that.

Mr. Isserman: We say that the Court on numerous occasions was discourteous to counsel and evidenced intemperance, impatience, and partiality. The Court intervened unduly in the examination and cross-examination of witnesses. We say that, according to the principles laid down in the cases, the Court was not "studious to avert controversy with counsel" but rather on occasion seemed to provoke such controversies. While the Court's manner or tone to counsel, aside from the actual language, can only be inferred from the state of the record, it is defense counsel's recollection that the Court's manner and tone on a substan-

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tial number of occasions showed irritation, annoyance, displeasure, and hostility.

428 During the trial there was a substantial display of feeling between the trial court and defense counsel, sufficient, as indicated by the state of the record, to have influenced the jury adversely to the defendant.

The Court: I have read all this. You are just reading from a manuscript. I have read all of this.

Mr. Isserman: Well, we would like to say that when all these incidents are considered together, when the displays of feeling between Court and counsel are evaluated, in the light of the cases involving incidents of a lesser number and of less importance than we have outlined before Your Honor, in which there have been reversals of convictions because of the action by the trial court in departing from the principles of impartiality as laid down by the cases, we think, therefore, the Court should give serious considerations to these matters; and we feel certain that if they are, a new trial will be ordered on this ground alone.

Mr. Rein: We have other grounds, Your Honor.

The Court: Proceed.

Mr. Rein: The next ground which we wish to discuss at this time is the Court's interpretation of the word "wilful" and its rulings on that.

The Court: So far as the interpretation of the word "wilful" is concerned, I do not think I will hear any argument on that, because I have made that ruling in two

429 different cases: in the Fields case and in this one. The Fields case is now before the Court of Appeals. I have studied this question and have heard counsel in this case and in others. I think it would not be helpful to anyone to argue that question further.

Mr. Rein: I think that Your Honor in your rulings and in your instructions to the jury in this case went beyond the Fields case, and that even if the Fields case were sustained—

The Court: Confine yourself to that. In what respect did they go further than in the Fields case?

Mr. Rein: I think, Your Honor, even under your instructions to the jury, that in order to wilfully default under this statute, the default must be deliberate and intentional, that the jury still should have been permitted to find and to decide whether or not the desire of the defendant, or of a witness, to make a legal objection before a committee constituted that deliberate and intentional default, constituted that deliberate, intentional refusal to testify.

The Court: I will overrule that point because that, of course, was a question of fact. I held the entire question a matter of fact for the jury as to whether the refusal was deliberate. I did rule also that advice of counsel or misconception of one's legal rights is not a defense. In so doing, I followed the Sinclair case.

Mr. Rein: If your Honor please, it is not our con-
430 tention that the defendant was refusing to be sworn on advice of counsel, and I do not think the issue was permitted to go to the jury, Your Honor, because we asked for instructions that the jury could consider whether or not the defendant wished to make a legal objection and, as a matter of fact, that they consider that in determining whether or not the action of the defendant was wilful.

The Court: I ruled on that at the trial after consideration of the matter. I do not think any purpose would be served by hearing further argument on that point.

Mr. Rein: Very well. Not only did you not permit the jury to pass upon that question, but you stated to the jury in your charge, Your Honor, that the issue in the case was whether or not a witness could—and I quote from your charge at the time, Your Honor—"dictate the conditions under which he will or will not take the oath as a witness or the conditions on which he will or will not testify."

I submit, Your Honor—

The Court: I did not say that that was the issue.

Mr. Rein: You said that that was one of the issues.

The Court: Oh.

Mr. Rein: You refused to submit to the jury the issue as to whether or not he wished to make a legal objection,

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in connection with wilfulness, thereby eliminating that issue, and thus characterizing the defendant's conduct
431 to the jury and leaving nothing for the jury to pass upon as a matter of fact.

The Court: I do not think I will hear anything further on the word "wilful."

You gentlemen have taken almost three-quarters of an hour on this motion for a new trial. That is longer than we ordinarily give to motions for new trials.

Mr. Rein: Commenting on the interpretation of the word "wilful," but in connection with the admission of evidence on the word "wilful," in permitting the Government to introduce evidence but excluding evidence when the defense wished to put it in, at a bench conference at the time of the opening statement of defense counsel your Honor stated that he would permit defense counsel in his opening statement to comment on what the witness wished to say before the House committee in that 3-minute statement. You at that time indicated that you thought the contents of that statement, insofar as it indicated legal objection, went to the issue of wilfulness.

Despite that statement at that time, and despite your permission to defense counsel to comment on that in his opening statement, when the question was asked on direct examination as to what it was he wished to say in that 3-minute statement, Your Honor sustained the objection and excluded that evidence.

432 The Court. No. I think, if my recollection is correct—I think you are in error—I permitted the witness to state what he wanted to say in a general way—that he wanted to interpose some legal objections to the committee's actions; or something to that effect. I did not, however, allow him to repeat the 3-minute statement. That is a different proposition.

Mr. Rein: Well, I should like to refer Your Honor to the record. We have the record citation in our memorandum. I think you will find that my statement of the evidence is correct.

I should like to go further, Your Honor, and point out that despite that, you permitted the prosecution on cross-examination to ask whether or not the defendant would have testified and would have answered the question after he had made a 3-minute statement, although you refused to permit the defense to examine and bring out that he would have answered the question. The prosecution was also permitted to argue to the jury on the basis of that examination that, in fact, he did not intend to answer questions.

The Court: What is the next point?

Mr. Rein: I should like also to point out in connection with this same evidence the defendant's willingness to make legal objection. Your Honor permitted counsel for the prosecution to put in evidence that the defendant had
433 counsel at the hearing, and to argue to the jury that it was the function of counsel to make legal objection before the committee, although you refused to permit the defendant to put in evidence to show that under the committee practice counsel is not permitted to make legal objections, so that if any legal objection was to be made before the committee, that legal objection would have had to be made by the witness and not by counsel.

In summary, I think that no issue of fact was presented to the jury, both by your rulings and by your instructions to the jury, and that Your Honor's charge to the jury was tantamount to a direction to find the defendant guilty.

I believe that certainly there was a sufficient issue of fact under any definition of wilfulness, Your Honor, to permit the jury to pass upon whether or not the defendant, because of his desire to make a legal objection, was not wilfully refusing to be sworn.

To go on to my next point, I believe the Court erred in excluding evidence which the defense wished to introduce to show that the committee in this case was acting improperly and beyond the scope of authority committed to it by the Congress.

The Court: I will not hear counsel on that at this time, because I passed on this matter on the motion to dismiss the indictment.

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434 Mr. Rein No, Your Honor.

The Court: You raised the committee's authority to—

Mr. Rein: This is another question, Your Honor.

The Court: What is the question?

Mr. Rein: The question here is not that the committee is not constitutional and does not have authority, but that the committee in this particular case acted beyond the authority committed to it by the Congress.

The Court: What was the evidence you claim should have been admitted?

Mr. Rein: The evidence and the offer of proof are in the record.

The Court: Tell me briefly what it is.

Mr. Rein: We offer to prove that the committee was not examining the defendant in order to elicit any information upon any matter of inquiry committed to it by Congress.

The Court: Oh, I recall now.

Mr. Rein: But rather to harass and punish the defendant for his political beliefs.

The Court: I will adhere to my ruling that the motives of the committee are immaterial; and therefore evidence of the motives of the committee will not be admitted.

Mr. Rein: Your ruling in that respect is tantamount to a statement that the conduct of a Congressional committee is not subject to judicial review under any circumstances.

435 The Court: It is tantamount to that unless the committee exceeds its authority; but what the motives of the committee are is not for the scrutiny of the judicial branch of the Government.

Mr. Rein: If Your Honor please, we were trying to show that the committee exceeded its authority, not what its motives were, Your Honor. I believe Your Honor's ruling makes it impossible ever to present any evidence to challenge the authority of a Congressional committee.

The Court: Proceed to the next point.

Mr. Rein: The next point, I believe, has been discussed before with Your Honor, and I shall not go into it in any detail at this time. We believe that the Court erred in excluding evidence to show that the defendant, as an enemy alien, was not required to testify.

The Court: That is a question of law that I have ruled on. I will adhere to my ruling.

Mr. Rein: As an alien in transit, he could not be called before the committee to testify, and that because he had been unlawfully arrested and unlawfully brought before the committee he was under no obligation—

The Court: I considered these matters, and I have already ruled on them.

Mr. Rein: Our final point in the brief, which I believe has already been covered by our discussion—that this
436 case should not have gone to the jury to permit the jury to make a decision in this case—is that there was not sufficient evidence to go to the jury in any event. We base that on two grounds. One is that it was essentially a part of the Government's case to show that the defendant was summoned before the committee upon matters of inquiry—

The Court: I ruled that out because I felt that that would be relevant if the defendant had refused to answer specific questions, for then the relevancy of the questions would be proper.

Mr. Rein: And also that the only thing that the evidence shows is that the defendant wished to make a legal objection before the committee, that Representative Thomas, chairman of that committee, stated that a witness before a committee had a right to make a legal objection before being sworn, and that on that evidence no verdict of guilty can be sustained, Your Honor.

The Court: Mr. Hitz?

Mr. Hitz: Your Honor, the Government is of the opinion that the affidavit of prejudice was properly denied because it was filed too late and was not sufficient on its face; that

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the conduct of the trial was not only proper but fair; that the jury was properly selected—that is the third point, that I do not believe, however, was covered here by defense counsel in argument. We do not believe there was
437 any error in the selection of the jury and the failure to disqualify Mr. Dean, who knew Mr. McInerney, for cause and for the other reasons that are mentioned here. The Government believes that the jury was properly selected.

The question of "wilful," I think, requires no reply by the Government. That has been adequately covered in the preliminary proceedings.

The evidence did seem to be sufficient to require submission of the case to the jury, and we think the jury's verdict should finally stand. We did not offer any evidence on the question of pertinency because that question never arose before the committee.

Mr. Eisler refused to be sworn, and therefore we think he did commit this contempt.

The Government has no reply to make to the other points that are argued here with respect to the details of the conduct of the trial. We think the record speaks for itself.

438 **Opinion of the Court**

The Court: The Court feels that the defendant had a fair trial. All of his rights under the Constitution and the laws were very sedulously accorded to him. Consequently, the Court feels that the assertion now made that the defendant did not have a fair trial or that the Court showed or exhibited prejudice against him or his counsel is not well founded. Otherwise, the motions for a new trial and in arrest of judgment do not present any new matter. Some additional observations appear appropriate, however, in regard to the contention that the judge should have disqualified himself because of the affidavit of bias and prejudice filed in behalf of the defendant.

In support of his argument, the defendant refers to the recent decision of the United States Court of Appeals for

the District of Columbia in Barsky v. Holtzoff, handed down June 11, 1947. That decision, however, is not a precedent for the situation presented here.

By memorandum filed by me on June 4, 1947, the affidavit of prejudice in this case was stricken on several grounds, among them that the affidavit was filed too late. The affidavit was not filed until May 29, 1947. Previously, on May 23, a motion to dismiss the indictment was argued before me on the merits and decided by me. Prior to this argument an application for a continuance of the trial was heard by me in chambers. Another application for a continu-
439 ance was informally heard and granted by me, subsequently to the argument of the motion to dismiss. It was only after the second continuance was granted that the affidavit of prejudice was filed.

The Barsky case is distinguishable because, as I am informed, counsel for the defendants in that case orally contended before the Court of Appeals that the affidavit in that case was filed in due time and that he sought to support his position by claiming that he did not know that the case was to come for trial before me until a few days before the affidavit was filed. The truth or falsity of this contention need not be here discussed. It was but natural, however, for the Court of Appeals to accept a statement of fact emphatically asserted by a member of the bar in open court.

The filing of an affidavit of bias and prejudice is a very serious and grave matter. For this reason the statute (U. S. Code, Title 28, Sec. 25) exacts a certificate made by counsel of record to the effect that the affidavit is filed in good faith and not for the purpose of hindrance and delay. The certificate of counsel attached to the affidavit in this case was executed by one Carol King, who is not a member of this bar, although David Rein, a member of the bar of this Court, was attorney of record. He did not sign the certificate. True, Carol King was admitted to practice by me solely for the purposes of this case. Nevertheless, a
440 lawyer who is not a member of the bar of this Court

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does not bear the responsibility that is imposed on a member of this bar. For this reason it is my view that the certificate of counsel must be made by a member of this bar, who is an attorney of record. Consequently, in this case, the affidavit lacked a sufficient certificate and was stricken for this additional reason.

There are some decisions which held that in passing on the sufficiency of an affidavit of bias and prejudice, the affidavit may not be controverted, but must be dealt with as though it were true. Practice has shown this rule to be exceedingly dangerous, especially as such affidavits are permitted to be made on information and belief. To hold that no matter how fantastic or how false the assertions in the affidavit may be, they must be taken to be true, may lead to converting affidavits of bias and prejudice into dangerous instrumentalities in the hands of unscrupulous lawyers, for thwarting the ends of justice or delaying its administration.

The United States Court of Appeals for the District of Columbia recognized the danger of that doctrine in Hurd v. Letts, 80 Appeals D. C. 233. That case involved an action in equity to enforce a restrictive covenant in a deed to real property. An affidavit of prejudice was filed against the trial judge on the ground that the latter lived in a house with a similar covenant in its title. The judge quite properly declined to recuse himself, stating that he was
441 only a tenant by the month. The Court of Appeals, having before it the judge's supplementary statement concerning the allegations of the affidavit, held that the affidavit, taken together with the judge's statement, was insufficient to show bias and prejudice.

In the Barsky case, the Court of Appeals held that the trial judge may file an answer when an application is made to the Court of Appeals for a writ of mandamus to direct him to recuse himself.

At the conclusion of my memorandum of June 4, 1947, in which I disposed of the affidavit of prejudice in this case, I stated that, "I have no recollection of ever hearing of the

defendant in this case until I saw his name in the newspapers several months ago." I feel that in view of the rulings in Hurd v. Letts and in the Barsky case, it is appropriate for me to make the following additional supplementary statement.

The assertion contained in the affidavit that while I was connected with the Department of Justice as Special Assistant to the Attorney General, I was assigned to the Federal Bureau of Investigation, is untrue. Likewise, it is untrue that my duties were concerned with investigations by the Federal Bureau of Investigation into the activities of aliens and Communists. It is untrue that I advised the Director of the Federal Bureau of Investigation as to steps or actions to be taken against alien communists. It
442 is likewise untrue that I participated in advising, siding, or determining the policy, nature, scope or objectives of the investigation directed against aliens and Communists. As Special Assistant to the Attorney General of the United States my duties were numerous. On occasion I was requested to give informal opinions to the Federal Bureau of Investigation on questions of law. This aspect of my work, however, consumed but a very small part of my time and was sporadic. I did not participate in determining the policy or scope of investigations. Such matters were handled by other officers of the Department of Justice.

I may also observe that eminent justices, past and present, who prior to their appointment to the bench had been connected with the Department of Justice, have followed the sound practice of not disqualifying themselves in any matter that was pending in that Department when they were connected with it, unless the matter had come to their personal notice, or unless they had taken some action in regard to it. I have pursued the same practice.

The motions for a new trial and in arrest of judgment are denied.

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443 Statement of Gerhart Eisler Before Imposition of Sentence

Mr. Eisler: Your Honor, permit me, sir, to state seven reasons why I should not be sentenced at all, neither to prison nor to a fine.

My first reason for this request is that I am the victim of a witch-hunting hysteria in this country, instigated and encouraged by the Un-American Activities Committee which abused the person of a German Communist, an
444 anti-fascist political refugee without a government, for its reactionary political aims. I do not think that law and justice in a democratic country should be influenced by such a hysteria as has happened, unfortunately, in my case.

My second reason is that I have already been—although innocent—very heavily punished by the authorities of the United States. I do not even count the ten weeks I was kept in prison for the illegal purpose of the Un-American Activities Committee, under the flimsy pretext of being a "dangerous enemy alien", but I count very heavily the fact that since May, 1945, I have been prevented from going back to my native land, despite all my numerous efforts. This is truly punishment enough for a man who has had to live for 13 years the bitter life of a political exile. The basic democratic right of a person to go back where he came from has been wantonly denied me. A prison sentence would continue this unjust and unreasonable punishment, and under still harder conditions of prison life.

The third reason for my request is the fact, disputed by nobody, that I am in the United States against my own will, and because of the extraordinary conditions created by the war. I beg of you to take into consideration that I was repeatedly prevented by the American authorities from going to a real and honest sanctuary for anti-fascist exiles, to Mexico. I repeat, a real and honest sanctuary and
445 not a trap and a waiting room for prison. Had I not been forced to stay in this country I would have been

back since the end of the war in my native land like so many other more fortunate European anti-Fascists, working there for the building of a peaceful, democratic, and progressive Germany. And I would never have been drawn into a conflict, a conflict which as a foreigner I did not seek, with the Un-American Activities Committee.

My fourth reason is the fact that all my activities during the war consisted in full support of the war effort of the United States and her Allies. Even my worst enemies and slanderers do not dare to doubt this.

My fifth reason is the fact that I am definitely not guilty of contempt of Congress. As a German Communist it is against my principles to feel or act contemptuously against other peoples and their democratic institutions. This, of course, does not mean that I am not full of contempt for the unlawful practices of the Un-American Activities Committee on the basis of my own experience. Such contempt, by the way, is expressed and shared by many and outstanding American citizens. The former Secretary of the Interior, Mr. Harold L. Ickes—

The Court: I will not hear the defendant denounce a committee of Congress. I will hear the defendant on the question of sentence.

446 Mr. Eisler: Your Honor, may I ask a question? I have three quotations. May I read—

The Court: I will not let you read quotations criticizing a committee of Congress. I think the matter of respect for a coordinate branch of the Government would not allow me to do so.

Mr. Eisler: My sixth reason is that my attitude at the hearing before the Un-American Activities Committee on February 6, 1947, was fully in accordance with the interests of the American people, upholding its democratic traditions, institutions, and laws. I did nothing else but demand three minutes freedom of speech in order to object against the cynical abuse of power by this committee, to state all my objections against my unlawful arrest and against my being brought unlawfully before this committee. By insisting

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upon my right to object before I take the oath I refused to waive this basic democratic right and defend thereby also the democratic customs and laws of the United States.

And, finally, my seventh reason for asking Your Honor not to sentence me is the consideration of the international implications. To sentence in the United States a European anti-Fascist, who has fought his whole life against German militarism and imperialism, because he asked for three minutes to raise his objections against the abuse of power would unavoidably weaken the confidence of many
447 millions of non-Americans in American justice and the American way of life. Such a sentence could not but lower the prestige of the United States in the eyes of the innumerable progressive-minded and freedom-loving peoples in the world. I ask you, therefore, to prove, by not sentencing me, that justice can be found in the United States for a European anti-Fascist despite the mad hysterial organized by the Un-American Activities Committee.

Should I, however, be sent to prison; should I, however, be forced to waste my time and money of the American taxpayers in an American prison instead of doing useful work in Germany, I shall go to prison with my head high. My conscience is clear, I have done what had to be done. I could not capitulate before reaction and waive my democratic and legal rights. I could not allow myself to be intimidated by those who have no respect for the Bill of Rights and are, to quote Henry A. Wallace, "a source of shame to decent Americans." I didn't want to behave differently than every decent American in my place would have behaved. I had enough and I had to object. And for this, Your Honor, I do not deserve to be sent to prison.

I thank you.

Mr. Isserman: I should like to enter an objection to the interruption by Your Honor of the defendant's statement.

The Court: Permission to make a statement is in
448 the discretion of the Court.

449 **Sentence of the Court**

The Court: In determining what sentence to impose in any case, this Court always takes into consideration a number of factors. Among them are the questions whether the defendant realizes the gravity and the importance of the offense he has committed; whether he has shown a repentant, contrite attitude; and whether he is willing to repair the damage that he has done, insofar as in him lies.

In this instance, the Court regrets to say that the defendant has shown an attitude of defiance; he is not contrite; and he does not appear willing to render any restoration or to cooperate with the Congressional committee which he has flaunted. He exhibited the same attitude throughout the trial.

During the trial, the defendant stated that he had a contemptuous feeling for the Congressional committee, and he has endeavored to repeat that in the statement which he has just attemped to make.

Although the Court had the authority to commit the defendant to jail after the jury found him guilty, and while he was awaiting sentence, nevertheless the Court in the exercise of its discretion permitted the defendant to remain on bail. Yet the defendant, not appreciating the discretion that was exercised in his favor, continued his openly defiant,
disrepectful attitude toward our Government. It is
450 apparent that this defendant does not respect the
institutions of this country. Under the circumstances, the Court feels there is no alternative except to impose the maximum sentence which the law provides.

Gerhart Eisler, it is the judgment of this Court that you be imprisoned in an institution to be designated by the Attorney General of the United States for a term of twelve months and that you be fined one thousand dollars.

* * * * * * * * * *

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452 **Defendant's Exhibit No. 1**

CONGRESS OF THE UNITED STATES
House of Representatives
Washington, D. C.

J. Parnell Thomas, 7th District N. J.
Chairman: Committee On Un-American Activities
Member: Committee on Armed Services
Home Address: Allendale, New Jersey
Office Address: 318 House Office Building

January 31, 1947

Honorable Tom C. Clark
Attorney General
Department of Justice
Washington, D. C.

Dear Mr. Attorney General:

On January 25, 1947, this Committee had a subpoena served upon *Gerhard Eisler*, of 48-46 47th Street, Woodside, Long Island, New York, requiring his appearance before the Committee on Un-American Activities, February 6, at the Committee's chambers in Washington, D. C. Eisler has been identified by witnesses before the Committee on Un-American Activities as being a representative of the Communist International.

The hearing which opens on February 6 will be of extreme importance, and it is necessary that Eisler be prohibited from departing from the United States or disappearing or refusing to appear. I have been reliably informed that he is endeavoring to take such steps. For this reason, I am requesting, as Chairman of the Committee on Un-American Activities, that you direct the agents of the FBI to put Eisler under an immediate twenty-four hour surveillance in order to insure his appearance before our Committee.

I am sure that your own files and records on this individual will justify my apprehension concerning this matter,

and your cooperation will be greatly appreciated by the Committee.

Sincerely yours,

J. PARNELL THOMAS
J. Parnell Thomas
Chairman
Committee on Un-American Activities.

* * * * * * * * * * *

Defendant's Exhibit No. 2

453

WASHINGTON, D. C.
APRIL 11, 1947

HONORABLE JOHN F. X. MCGOHEY
UNITED STATES ATTORNEY
U. S. COURT HOUSE
NEW YORK, NEW YORK

PENDING A REVIEW OF THE ALIEN ENEMY HEARING BOARD'S DECISION, YOU ARE AUTHORIZED TO RELEASE GERHART EISLER AS OF 10:00 A.M. ON APRIL 15, 1947, FROM CUSTODY UNDER THE PRESIDENTIAL WARRANT ISSUED ON FEBRUARY 4, 1947 SO THAT HE MAY BE REMOVED TO THE DISTRICT OF COLUMBIA AND ARRAIGNED ON CRIMINAL CHARGES FILED AGAINST HIM IN THAT DISTRICT. THIS ACTION WILL RENDER MOOT THE QUESTIONS INVOLVED IN EISLER'S APPEAL FROM THE DECISION OF JUDGE FRANCIS G. CAFFEY.

TOM C. CLARK
Attorney General

* * * * * * * * * * *

Indictment

454

Filed in open Court
Feb. 27, 1947

The Grand Jury Charges:

Pursuant to Public Law No. 601, Section 121, of the 79th Congress, (Ch. 753 - 2d Session), and House Resolution 5 of the House of Representatives of the United States, 80th Congress, dated January 3, 1947, the House of Representatives was empowered to and did create the Committee on

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Un-American Activities, having duties and powers as set forth in said Public Law.

Gerhart Eisler, having been summoned as a witness by the authority of the House of Representatives, through its Committee on Un-American Activities, to give testimony before the said Committee at its session within the District of Columbia on February 6, 1947, upon matters of inquiry committed to said Committee by Public Law No. 601, Section 121, and aforesaid Resolution 5, did appear before the said Committee, on February 6, 1947, and was directed to be sworn to testify upon said matters, and the said Gerhart Eisler thereupon failed and refused so to be sworn to testify, and thereby on February 6, 1947, within the District of Columbia, willfully did make default.

GEORGE MORRIS FAY
Attorney of the United States in and for the District of Columbia.

A True Bill:
HELEN M. HOFFMAN
Foreman.

* * * * * * * * * *

Plea

455 Tuesday, April 22, 1947

The Court resumes its session pursuant to adjournment: Hon. Bolitha J. Laws, presiding.

* * *

UNITED STATES vs GERHART EISLER

Criminal No. 219-47

Come as well the Attorney of the United States, as the defendant in proper person, according to his recognizance, and by his attorneys, Messrs. Carol King and David Rein; whereupon the defendant being arraigned upon the indictment, the reading whereof he specifically waives, pleads not guilty thereto, and for trial puts himself upon the country and the Attorney of the United States doth the like; and thereupon by consent of the United States Attor-

ney the defendant is granted leave within Twelve (12) days to withdraw said plea and demur to, or move to quash the said indictment, or otherwise plead as he may be advised.

* * * * * * * * * * *

458 Filed May 5 1947

Defendant's Motion to Dismiss Indictment

The defendant moves that the indictment be dismissed on the following grounds:

1. The indictment does not state facts sufficient to constitute an offense against the United States. The indictment shows on its face that the defendant appeared before the Committee on Un-American Activities, and fails to state and indeed rebuts any action by defendant which constituted a wilful default under the statute.

2. The defendant was not, at the time of the alleged default, a person subject to the statute or to the legislative jurisdiction to compel appearance and testimony before a Congressional committee. In support of this ground there is attached hereto and made a part hereof an affidavit of the defendant, marked Exhibit A, and a certified copy of the record on appeal in United States of America ex rel. Gerhart Eisler vs. District Director of Immigration and Naturalization of the Port of New York, United States Circuit Court of Appeals for the Second Circuit, No. 231, marked Exhibit B.

3. The statute and resolution creating the Committee on Un-American Activities of the House of Representatives and committing certain matters of inquiry thereto are invalid; and U. S. Code, title 2, section 192, cannot be constitutionally applied to punish the withholding of testimony from said Committee.

459 4. The proceedings herein were instituted not in aid of the legislative power to compel testimony, but for other purposes not within the legislative powers or the purview of the statute on which the indictment is founded or the authority of said Committee, as shown by

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facts and circumstances of which the Court may take judicial notice.

CAROL KING
220 Broadway
New York 7, New York

DAVID REIN
1105 K Street, N. W.
Washington, D. C.
Attorneys for Defendant.

Served:
W. HITZ
Assist. U. S. Atty.

May 5, 1947

460 Filed May 5 - 47

Exhibit A.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA vs. GERHART EISLER

Criminal No. 219-47

COUNTY OF NEW YORK
State of New York, ss

Gerhart Eisler being duly sworn deposes and says:

(1) I am the defendant in United States of America v. Gerhart Eisler, Criminal No. 219-47.

(2) In 1939, shortly before the outbreak of the war, I was arrested in Paris with several thousand other anti-Fascist refugees, many of whom had fought on the loyalist side in Spain. We were beaten, starved, abused, and not a few of us were killed in French prisons and concentration camps. When the Nazi armies started to overrun France, the danger arose that we would be extradited to Hitler Germany in order to be tortured and killed.

The former president of Mexico, General Cardenas, sent to many of us, myself included, an invitation to come to Mexico as a sanctuary. The diplomatic representatives of Mexico in France intervened strongly in our behalf, as well as many decent Americans who demanded from Vichy the right for refugees of all creeds and political opinions to leave France.

Consequently, I and many others were sent from Vernet to another concentration camp near Marseille, in order to depart for Mexico. The Mexican Consul-General in Marseille, Mr. Bosquez, gave me and other refugees Mexican substitutes for a passport. No boat, however, left from Marseille directly for Mexico at that time and very few French boats sailed at all because the British had captured the boats of Vichy France. The French authorities did not want to grant us exit permits to leave for Mexico until we had obtained transit visas through the United States. This was because French boats went only to Martinique and from Martinique there was no direct transportation to Mexico. The route from Martinique to Mexico was *via the United States.* Since the French did not want us in Martinique, they wanted to make absolutely sure that we would leave for Mexico by the way of the United States.

461

At last, the American Consul-General in Marseille granted me and other refugees transit visas. But we were told we would not be allowed to go ashore in the United States, to which we agreed.

Finally, in the middle of May, 1941, I and many others left from Marseille with the French Boat, "Winnepeg", for Martinique. We were not very far from Martinique when our boat was captured by a Dutch cruiser and brought to Trinidad in the West Indies. We were again interned in a concentration camp, where we were carefully screened by the British military authorities.

But there were no boats from Trinidad to Mexico, either. We had to take an American boat for New York and change there for Mexico. I took such a boat with others.

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I arrived on the SS "Evangeline", on June 13th, 1941, at the port of New York. I was brought to Ellis Island in a group of political refugees who were heading for Mexico. Those who were Yugoslavs, Hungarians, or Czechs were allowed to proceed on the next boat to Mexico. Those, like myself, who were Germans or Austrians had to remain in Ellis Island and were not permitted to go to Mexico. There existed an emergency law, directed against German Bundists and Italian Fascists, prohibiting their departure from the United States to any Latin-American
462 country during the war, to prevent their continuing in those countries their Fascist activities. This law did not make any distinction between Anti-Fascists and Fascists. As a result I was kept 2½ months at Ellis Island, together with other German anti-Fascists, until the American authorities decided what disposition to make of us. Finally I was released on $500.00 bail from Ellis Island in the status of a visitor, with the right to stay in this country for sixty days. During these sixty days I again asked for permission to leave for Mexico. This was again refused. I was kept here during the War as a refugee in the ordinary sense of that word.

On May 25, 1945, (immediately after the downfall of the Hitler regime) I applied, together with seventeen other anti-Nazi refugees, to the State Department for permission to return to Germany. That was refused. We repeated our request many times without success. We applied to all other embassies of the occupying powers unsuccessfully, until the Soviet government granted me and other German anti-Fascists a transit visa through Russia in order to proceed to Berlin or Leipzig where I lived and worked before Hitler came to power.

The State Department on July 31, 1946, granted me an exit permit. *Before* it was granted the FBI questioned me for many hours. Unfortunately, because of strikes and irregular passenger service, it was not until October that I was able to get a place on a boat leaving October 18th, 1946. My baggage was already cleared and partially on

the boat, when on October 16th, I found out by accident that my exit permit was cancelled, without any reason
463 given.

I later learned that the reason for the cancellation of my exit permit was the issuance of a cock and bull story by Louis F. Budenz, who had resigned as Editor of the Daily Worker to take a job as Professor of Philosophy at Notre Dame. This story said that I was the "master mind" of the Communist Party, a representative of the Communist International, and other falsehoods.

As a result of these statements, I was subpoenaed to appear before the Wood-Rankin Committee on November 22, 1946. I duly appeared in Washington on that day and was told that I was not required at that time but would be notified when I was needed.

On the 24th day of January, 1947, I was phoned by an employee of the House Un-American Activities Committee who said he had a subpoena for me. I arranged to meet him to receive the subpoena, which called for my appearance before the Committee on February 6, 1947. My lawyer reserved a room at a hotel in Washington for that date, and on February 3, 1947, my wife bought railroad passage to Washington. My attorney went to Washington on February 4, 1947, to be present at that hearing. On the same day I was arrested as an enemy alien and was brought before the Committee on the 6th under arrest. I stated that I would testify and be sworn after I had made a three minute statement protesting the insinuation of the Chairman of the Un-American Activities Committee, Representative J. Parnell Thomas, that I would not appear unless arrested. This right was denied to me, and I remained silent.

GERHART EISLER

Sworn to before me this
29th day of April, 1947
CAROL KING

BLEED THROUGH—POOR COPY

464 Filed May 5 1947

Defendant's Motion for Bill of Particulars

The defendant moves the Court to direct the prosecution to file a bill of particulars setting forth in detail the specific matters concerning which the defendant was summoned to give testimony before the Committee on Un-American Activities of the House of Representatives.

CAROL KING
220 Broadway
New York 7, New York

DAVID REIN
1105 K Street N. W.
Washington 5, D. C.
Attorneys for Defendant.

* * * * * * * * * *

Motions to Dismiss the Indictment and for Bill of Particulars Denied

465 Friday, May 23, 1947

The Court resumes its session pursuant to adjournment: Hon. Alexander Holtzoff, presiding:

* * *

UNITED STATES vs. GERHART EISLER

Criminal No. 219-47

Come as well the Attorney of the United States, as the defendant in proper person, according to his recognizance, and by his attorneys, Carol King and David Rein; and thereupon the defendant's motion to dismiss the indictment and motion for a bill of particulars, coming on to be heard, after argument by the counsel, is by the Court denied without prejudice.

* * * * * * * * * *

Affidavit of Prejudice

466 Filed May 29 1947

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK ss.

GERHART EISLER, being duly sworn, deposes and says:

1) I am the defendant in the above entitled cause;
2) I believe that the Honorable Alexander Holtzoff, Judge of the Court in which this action has commenced and is now pending, and before whom it is to be tried or heard, has personal bias and prejudice against me and in favor of the opposing party herein, and, further
that the said Judge is concerned in and interested in said action and the reason for such belief is as follows:

a) I am an anti-fascist and was and still consider myself a member of the German communist movement. I was active for many years with the German underground in their struggle against Hitler and Nazism.

b) This cause is a prosecution for violation of Section 192 of Title 2 of the U. S. Code in which I am charged with willfully making default before the House Committee on Un-American Activities. I was called before this Committee because of the above activities and the lies and slanders about me in the testimony of Louis Francis Budenz and others before that Committee. At a hearing of the Un-American Activities Committee on February 6, 1947, out of which this very cause arose there was placed into the record a statement of J. Edgar
467 Hoover, director of the Federal Bureau of Investigation which was allegedly a report of an investigation of my activities by the Federal Bureau of Investigation over many years. Moreover, this report is set forth in full at pages 11-12 of the Committee hearings of February 6, 1947. This report indicates strong personal bias and prejudice against me. During the period of the investigation and until his elevation to the bench in September, 1945, Justice Holtzoff acted as

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special assistant to the Attorney General assigned to the Federal Bureau of Investigation. His duties were concerned especially with the investigation by the F. B. I. into the activities of aliens and communists, into both of which catagories I fall. I believe that this investigation of my activities must have come to Justice Holtzoff's attention during the period while he performed such duties.

c) In a letter dated March 25, 1940, printed at A2466 of Vol. 87 of the Congressional Record, Justice (then Mr.) Holtzoff said:

"It so happens that for the past 15 years I have been, and am now, connected with the Department of Justice in a legal capacity. The Federal Bureau of Investigation, as you know, is a branch of that Department. I have had numerous official contacts with the Bureau, sometimes almost daily. In addition, Mr. J. Edgar Hoover is my close personal friend. Consequently I have had an excellent opportunity to observe the operations of the Federal Bureau of Investigation at close range from day to day." (See also Statement of the Assistant to the Attorney General, Hearings before the Senate Appropriations Committee, Sub-Committee on the 1941 Appropriation Bill of the State, Commerce and Justice Department, 76th Cong.
468 3rd Sess., p. 71)

d) In connection with his duties as United States attorney assigned to the F. B. I., Justice Holtzoff advised J. Edgar Hoover as to steps and actions to be taken against alien communists, such as myself. For instance, he sponsored and supported a bill permitting deportation of aliens and their being placed in concentration camps upon proof of membership in the Communist Party (see Hearings before Sub-Committee No. 2 of the Committee on the Judiciary, House of Representatives, 77th Cong., 1st Sess., H. R. 3). He appeared as representative of the F. B. I. on many occasions and defended that Bureau to the point where he was publicly

and responsibly charged with distorting the facts (87 Cong. Rec. A2470-1).

e) J. Edgar Hoover is and has been violently anti-Communist and, upon information and belief, has referred to Communists as "vermin" and "rats" and on occasion has referred to Communism as "red fascism", "a malignant growth" and "a virulent poison" (e. g. H. Rept. No. 2742, 79th Cong., 2d Sess., pp. 2-4). Justice Holtzoff not only sponsored activities, legislative and otherwise, which reflect these intemperate views of Mr. Hoover, and was associated with Mr. Hoover in such activities, but claimed that Mr. Hoover was "my close personal friend." He has publicly praised Mr. Hoover in most fulsome terms. (87 Cong. Rec. A2467) His close association with Mr. Hoover and the F. B. I. is reflected in his statement "I consider myself a competent witness concerning the activities of the Federal Bureau of Investigation, since I have watched them from day to day for a period of years." (op. cit. A2469)
Justice Holtzoff was legal advisor to the F. B. I. at the time the investigation of me was commenced and continued as such until September, 1945. Upon information and belief, he figured in an important capacity in advising and aiding and determining the policy, nature, scope and objectives of the investigation directed
469 against aliens and communists, which necessarily included myself.
In letters dated April 2 and 11, 1940, Justice Holtzoff defended the propriety of a compilation by the Federal Bureau of Investigation of intelligence concerning persons who were not criminals and who were neither charged with nor suspected of violations of law, but whose political views and opinions differed from those deemed to be proper by the Federal Bureau of Investigation (op. cit. A2469), clearly including those believed to be communists.

f) Among the issues involved in this case is the question of the right of the Un-American Activities Committee to

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question me and others about political and other matters which are un-American" as determined by the prejudices of the members of the Committee, the scope of authority vested in the Committee, its constitutionality, etc. The views expressed by Justice Holtzoff and his activities, while assigned by the Department of Justice to the F. B. I., indicate, in my opinion, that Justice Holtzoff is biased and prejudiced against me and in favor of the prosecution in this case and is incapable of giving me a fair trial; all of which serves to disqualify him.

g) I was first advised on or about May 20, 1947 by my counsel, who had just learned of the fact, that this case was to be tried before Justice Holtzoff. At that time I asked one of my counsel, Abraham J. Isserman, whether I was obliged to go on trial before a judge who had been connected with the F. B. I. and J. Edgar Hoover. He suggested that he would discuss it with my other counsel in Washington, D. D. on May 23rd. I was subsequently advised that no conference on this question was held on that day because of the sudden death of Mr. Isserman's brother. Mr. Isserman was unavailable because of this bereavement, until May
470 27th, on which day my counsel conferred. They reported to me on May 28th after which I directed them to prepare this affidavit.

GERHART EISLER

Sworn to before me this 28th day of May, 1947.

JACOB S. FUCHS

Jacob S. Fuchs

Notary Public, in the State of New York Resident of Bronx Co. at time of Appointment Bronx Co. Clk's No. 57, Reg. No. 84-F-9 Cert. filed in N. Y. Co. Clk's No. 595, Reg. No. 312-F-9 Commission Expires March 30, 1949

CERTIFICATION OF COUNSEL.

I hereby certify that I as counsel of record in the above entitled case, and as such prepared the above affidavit at the request of the plaintiff; that I am informed as to the proceedings therein and that such application and affidavit are made in good faith and not for the purpose of hindrance or delay. The reason for the failure to file the above affidavit not less than ten days before the beginning of the term of the Court is that the Honorable Alexander Holtzoff was not designated to try or hear this case until on or about May 20, 1947.

CAROL KING
Attorney for the Defendant

Dated: 28th day of May, 1947

* * * * * * * * * *

471 Filed Jun 16 1947

Motion for New Trial

The defendant moves the Court to grant him a new trial for the following reasons:

1. The Court erred in refusing to disqualify himself following the defendant's filing before trial of the affidavit of personal bias and prejudice.

2. The defendant was substantially prejudiced and deprived of a fair trial in that the Court's demeanor, conduct of trial, and treatment of the defendant and the defendant's counsel indicated to the jury that the Court was prejudiced and biased against and hostile to the defendant.

3. The Court erred in denying defendant's motion for judgment of acquittal made at the conclusion of the evidence.

4. The verdict is contrary to the weight of the evidence.

5. The verdict is not supported by substantial evidence.

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6. The Court erred in charging the jury and in refusing to charge the jury as requested.

7. The Court erred in denying defendant's motion to dismiss the indictment.

8. The Court erred in admitting testimony of the witnesses John Parnell Thomas and Gerhart Eisler to which objections were made.

472 9. The Court erred in sustaining objections to, and in excluding on its own motion, questions addressed to the witnesses John Parnell Thomas, Arthur J. Brosnan, Steve Greenman, Reginald Parker, James M. McInerney, Robert E. Stripling, Charles M. Rothstein, Gerhart Eisler, and Carol King, and in excluding proffered testimony of said witnesses.

10. The Court erred in denying defendant's motions to strike testimony of the witness John Parnell Thomas.

11. The Court erred in excluding proffered exhibits, marked Defendant's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 for Identification.

12. The Court erred in questioning the jury panel and in refusing to question the jury panel as requested.

13. The Court erred in denying the motion to excuse for cause or favor Frank Dean, called as a juror.

14. The Court erred in refusing to make inquiries of the jury as requested.

15. The Court erred in the restrictions it placed on the defense's opening statement to the jury.

16. The Court erred in refusing to take, on request of counsel, judicial notice of official proceedings in the United States House of Representatives.

17. The Court erred in refusing to allow defendant to make offers of proof when requested.

18. The Court erred in refusing to allow defendant to make objections to the Court's instructions out of the hearing of the jury.

ANDREW J. ISSERMAN
A. J. Isserman
National Press Building
Washington, D. C.
CAROL KING
Carol King
220 Broadway
New York, New York
DAVID REIN
David Rein
1105 K Street, N. W.
Washington, D. C.

* * * * * * * * * *

473 Filed Jun 16 1947

Motion in Arrest of Judgment

The defendant moves the court to arrest the judgment for the reason that the indictment does not state facts sufficient to constitute an offense against the United States.

ANDREW J. ISSERMAN
A. J. Isserman
National Press Building
Washington, D. C.
CAROL KING
Carol King
220 Broadway
New York, New York
David Rein
David Rein
1105 K Street, N. W.
Washington, D. C.

* * * * * * * * * *

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Defendant's Motion in Arrest of Judgment and Motion for New Trial Denied

474 Come as well the Attorney of the United States, as the defendant in proper person, according to his recognizance, and by his attorneys, Carol King, David Rein and A. J. Isserman; and thereupon the defendant's motion in arrest of judgment and motion for a new trial, coming on to be heard, after argument by the counsel, is by the Court denied.

* * * * * * * * * *

Judgment and Sentence

Come as well the Attorney of the United States, as the defendant in proper person, according to his recognizance, and by his attorneys, Carol King, David Rein and A. J. Isserman; and thereupon it is demanded of the defendant what further he has to say why the sentence of the law should not be pronounced against him and he says nothing except as he has already said; whereupon it is considered by the Court that, for his said offense, the said defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period on One (1) year, and to pay a fine of One Thousand ($1,000.00) Dollars; and thereupon the Court fixed the amount of bond in this case at Twenty-Thousand ($20,000.00) Dollars pending appeal.

* * * * * * * * * *

Excerpt from Stipulation

477 III. Facts Stipulated.

It is stipulated and agreed that on about April 22, 1947, immediately prior to defendant's arraignment in the District Court, Carol King was admitted by Chief Justice Laws to the bar of the District Court of the District of Columbia for the purposes of this case, that on the same day she entered her appearance of record in writing as counsel for the defendant, and that she is and was at all times from and

after the arraignment of the defendant a counsel of record for the defendant in said case.

DAVID REIN
Counsel for defendant.

WILLIAM HITZ
Assistant U. S. Attorney for the District of Columbia

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Docket Entries

479 219-47 CRIMINAL DOCKET

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

PARTIES UNITED STATES vs. GERHART EISLER

ATTORNEYS U. S. ATTORNEY CAROL KING & DAVID REIN
G. J. No. Orig.
Criminal No. 219-47 Charge: Vio. Sec. 192, Title 2, U. S. Code.
Bond: $20,000.00 Treasury bonds, George Marshall

Date	Proceedings
1947 Feb 27	Presentment and Indictment filed
27	Bench Warrant Ordered & issued. (M142)
Apr 17	Bench Warrant returned, "Cepi". (Defendant on bond) (M 142)
22	Arraigned, Plea not Guilty, 12, days, etc. (M. 142)
22	Appearance of Carol King and David Rein entered.
21	United States Treasury bonds in the amount of $20,000.00 taken with George Marshall, surety filed in case 219-47 and Case 376-47. filed.
May 5	Defendant's Motion to Dismiss Indictment, filed, & affidavit in support thereof. Memorandum in Support of Defendant's motion

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to Dismiss the Indictment, filed. Defendant's Motion For Bill of Particulars, filed.

9 Supplementary Memorandum in Support of Defendant's motion to Dismiss indictment, filed.

19 Government's Memorandum in Opposition to Motion to Dismiss, filed.

23 Motion to dismiss and Motion for Bill of Particulars argued and denied without predjudice (M 143)

29 Affidavit of Bias and Prejudice against Justice Alexander Holtzoff, filed.

Jun 3 Transcript of proceedings dated May 23, 1947 filed.

4 Motion for continuance argued and denied (M 143)

4 Memorandum opinion filed striking defendant's affidavit of prejudice.

4 Jury sworn; Respited until tomorrow (M 143)

5 Trial resumed, same jury; Respited until Monday, June 9, 1947 (M 143)

1947 Jun 5 Certified record of Official Reporter, Volume 1, pages 1-111, filed.

6 Transcript of proceedings, pages 112-241 filed.

9 Trial resumed, same jury; Respited until tomorrow (M 143)

10 Trial resumed, same jury; Verdict Guilty as indicted.

Defendant permitted to remain on bond pending sentence (M 143)

10 Transcript of proceedings, pages 242-317 filed.

11 Certified record of Official Reporter, Volume 4, pages 318-393 filed.

13 Certified record of Official Reporter, Volume 5, pages 394-401 filed.

16 Motion in Arrest of Judgment and Points & Authorities in support of Motion in Arrest of Judgment, filed.

16 Motion for New Trial & Points & Authorities in support of Motion for New Trial filed.

27 Defendant's motion in arrest of judgment and Motion for New Trial argued and denied. Memorandum filed. (M 143)

27 Sentenced to imprisonment for a period of One (1) year and to pay a fine of One Thousand ($1,000.00) Dollars. (JUDGMENT SIGNED) (HOLTZOFF, J.) (M 143)

27 Bond pending appeal fixed at $20,000.00 (M 143)

27 Memorandum in Support of Motion for a New Trial filed.

27 Recognizance $20,000.00 taken with U. S. Treasury bonds deposited 4/21/47 by George Marshall, surety, pending appeal.

27 Notice of Appeal filed (M 143)

Jul 2 Designation of record and stipulation filed.

11 Sentence of the Court pages 48-50 filed. Certified record of Official Reporter, Volume 1, pages 1-50 filed.

Aug 1 Order extending time for filing record and docketing proceeding on appeal to October 6, 1947 filed (See Order) (Morris, J.) (M 142)

1 Motion to extend time for filing record and docketing proceeding on appeal filed.

Sept 26 Defendant's corrected designation of record, filed. Photostatic copies of Defendant's Exhibits #1 & #2, filed.

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United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9582

GERHART EISLER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the District of Columbia

Argued April 5, 1948 Decided June 14, 1948

Messrs. David Rein and Abraham J. Isserman, with whom *Mr. Joseph Forer* was on the brief, for appellant.

Mr. William Hitz, Assistant United States Attorney, with whom *Mr. George Morris, Fay*, United States Attorney, was on the brief, for appellee. *Mr. Sidney Sachs*, Assistant United States Attorney, also entered an appearance for appellee.

Mr. Belford V. Lawson, Jr., filed a brief on behalf of the National Lawyers Guild as *amicus curiae*, urging reversal.

Before CLARK, PRETTYMAN, and PROCTOR, JJ.

CLARK, *J.:* Appellant is an Austrian national who arrived in this country in 1941 as a political refugee, by virtue of a transit visa. On January 24, 1947, appellant was yet a temporary resident in this country and was on that date summoned by authority of the House of Representatives, through its Committee on Un-American Activities,[1] to appear as a witness before that Committee on February 6, 1947. On January 31, 1947, the Chairman of the Committee wrote a letter to the Attorney General of the United States informing the latter that a subpoena had been served on appellant and requesting assistance in the following manner: "The hearing which opens on February 6 will be of extreme importance, and it is necessary that Eisler be prohibited from departing from the United States or disappearing or refusing to appear. I have been reliably informed that he is endeavoring to take such steps. For this reason, I am requesting, as Chairman of the Committee on Un-American Activities, that you direct the agents of the FBI to put Eisler under an immediate twenty-four surveillance in order to insure his appearance before our Committee."

Subsequently, on February 4, 1947, appellant was arrested by two security officers of the Immigration and Naturalization Service, De-

[1] Hereinafter referred to as the Committee.

partment of Justice. On February 6, 1947, appellant appeared before the Committee in the custody of the security officers, accompanied by his legal counsel. When he was called as a witness the following colloquy ensued:[2]

The Chairman.[3] Now, Mr. Stripling, call your first witness.
Mr. Stripling. Mr. Gerhart Eisler, take the stand.
Mr. Eisler. I am not going to take the stand.
Mr. Stripling. Do you have counsel with you?
Mr. Eisler. Yes.
Mr. Stripling. I suggest that the witness be permitted counsel.
The Chairman. Mr. Eisler, will you raise your right hand?
Mr. Eisler. No. Before I take the oath—
Mr. Stripling. Mr. Chairman—
Mr. Eisler. I have the floor now.
Mr. Stripling. I think, Mr. Chairman, you should make your preliminary remarks at this time, before Mr. Eisler makes any statement.
Mr. Chairman. Sit down, Mr. Eisler. Now, Mr. Eisler, you will be sworn in. Raise your right hand.
Mr. Eisler. No.
The Chairman. Mr. Eisler, in the first place, you want to remember that you are a guest of this Nation.
Mr. Eisler. I am not treated as a guest.
The Chairman. This committee—
Mr. Eisler. I am a political prisoner in the United States.
The Chairman. Just a minute. Will you please be sworn in?
Mr. Eisler. You will not swear me in before you hear a few remarks.
The Chairman. No; there will be no remarks.
Mr. Eisler. Then there will be no hearing with me.
The Chairman. You refuse to be sworn in? Do you refuse to be sworn in, Mr. Eisler?
Mr. Eisler. I am ready to answer all questions, to tell my side.
The Chairman. That is not the question. Do you refuse to be sworn in? All Right.
Mr. Eisler. I am ready to answer all questions.
The Chairman. Mr. Stripling, call the next witness. The committee will come to order, please. What is the pleasure of the committee?
Mr. Stripling. Mr. Chairman, I think that the witness should be silent, or take the stand or be removed from the room, one or the other, until this matter is determined.
Mr. Mundt. Mr. Chairman, suppose you ask him again whether he refuses to be sworn.
Mr. Rankin. Not "sworn in," but to be sworn.
The Chairman. Mr. Eisler, do you refuse, again, to be sworn?
Mr. Eisler. I have never refused to be sworn in. I came here

[2] According to the official transcript of the proceedings before the Committee, read into the record at the trial of this case.

[3] The Chairman of the Committee, who was presiding, was Representative J. Parnell Thomas. Mr. Stripling was the Committee's chief investigator. Mr. Mundt and Mr. Rankin were members of the Committee.

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as a political prisoner. I want to make a few remarks, only 3 minutes, before I be sworn in, and answer your questions, and make my statement. It is 3 minutes.

The Chairman. I said that I would permit you to make your statement when the committee was through asking questions. After the committee is through asking questions, and your remarks are pertinent to the investigation, why it will be agreeable to the committee. But first you have to be sworn.

Mr. Eisler. That is where you are mistaken. I have to do nothing. A political prisoner has to do nothing.

The Chairman. Then you refuse to be sworn.

Mr. Eisler. I do not refuse to be sworn. I want only 3 minutes. Three minutes to make a statement.

Mr. Chairman. We will give you those 3 minutes when you are sworn.

Mr. Eisler. I want to speak before I am sworn.

The Committee then voted to cite Mr. Eisler for contempt. Thereafter, on February 27, 1947, an indictment was returned by the Grand Jury for the District of Columbia charging appellant with a violation of 52 Stat. 942 (1938), 2 U. S. C. § 192 (1946)[4] Appellant was tried before a jury in the District Court of the United States for the District of Columbia and found guilty; he has appealed from the judgment of conviction.

At the outset we are confronted with the contention made by appellant that the trial judge erred in refusing to disqualify himself following the filing of appellant's affidavit of bias and prejudice. The Justice designated to preside at the trial of this case struck the affidavit, principally on the grounds that it was filed too late and that it was legally insufficient.

The statute[5] which allows the filing of such an affidavit requires that "Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time." This case was originally set for trial on May 26, 1947. Several days prior to that date counsel for appellant requested a continuance of the argument on preliminary motions and of the trial. The Justice who had been designated to preside at the trial denied the continuance of the motions but granted continuance of the trial to May 27. Then, on May 23, the motions were argued and disposed of, and counsel for appellant requested a further continuance of the trial date because of the death of a brother of the chief trial attorney for the defense, which had occurred that day. The request was granted and the trial continued to June 4. We deem it necessary to set out these happen-

[4] The statute reads as follows: "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

[5] 36 Stat. 1090 (1911), 28 U. S. C. § 25 (1946). (Judicial Code, § 21.)

ings with chronological references, for the affidavit of bias and prejudice was not filed by appellant until May 29. As has been noted, this was after two continuances had been granted by the Justice against whom the affidavit was directed; it was three days after the first trial date had passed, and only six days prior to the date when the trial actually began.[6]

Appellant contends he had no knowledge of the identity of the trial Justice prior to May 20, although in the usual course of affairs he should have received notice of the designation earlier than that time. Nevertheless, the delay then ensuing before the affidavit was filed is attributed to the death of a brother of the chief defense counsel and the asserted consequence that the latter was prevented from giving his immediate attention to the matter. The explanation is reasonable so far as it goes, but appellant had two other counsel of record, one of whom actually certified the affidavit submitted, and it is not shown that it was essential to delay the affidavit for the reason given. This court has demonstrated willingness to apply the statute with liberality, with respect to the time element, where good cause was shown for delay in filing the affidavit, but we are not moved in this case to do so. See *Hurd* v. *Letts*, 80 U. S. App. D. C. 233, 152 F. 2d 121 (1945).

We are of the opinion that the lower court properly determined, as the second ground for striking the affidavit, that it was legally insufficient to show personal bias or prejudice regarding the justiciable matter pending before the court. The Supreme Court has ruled that the judge has a lawful right to pass on the legal sufficiency of the affidavit, *Berger* v. *United States*, 255 U. S. 22 (1921), subject to appellate review, of course, and we consider it the duty of the judge, when the showing for recusation is insufficient, to remain in the case.

The basis for disqualification upon affidavit is that the judge has personal bias or prejudice either against the affiant or in favor of an opposite party, by reason of which the judge is unable to impartially exercise his functions in the particular case. *Ex Parte American Steel Barrel Co.*, 230 U. S. 35 (1913). This court said, in *Hurd* v. *Letts, supra*:

> "Nothing is now better established than the rule that a sufficient affidavit under the statute must state facts and reasons which tend to show personal bias and prejudice *regarding the justiciable matter pending* and must give support to the charge of a bent of mind that may prevent or impede impartiality of judgment. Berger v. United States, 255 U. S. 22, 33, 41 S. Ct. 230, 65 L. Ed. 481.
>
> "Accordingly, the question in all such cases is whether the affidavit asserts facts from which a sane and reasonable mind might fairly infer personal bias or prejudice on the part of the judge. * * *"[7] (Italics supplied.)

In the affidavit filed in this case, appellant identifies himself as a "German Communist" and then attempts to show bias and prejudice on the part of the Justice assigned to conduct his trial by reflecting on the latter's background as a Special Assistant to the Attorney

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[6] See *Refior* v. *Lansing Drop Forge Co.*, 124 F. 2d 440 (C. C. A. 6th, 1942).

[7] 80 U. S. App. D. C. 233, 234, 152 F. 2d 121, 122.

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General of the United States. Appellant alleged, upon information and belief, that the judge had, in that prior capacity, directly assisted Federal Bureau of Investigation inquiries into the activities of aliens and Communists, including appellant. It was further alleged that the judge was a close personal friend of the Director of the FBI, whom appellant characterizes as "violently anti-Communist." The affidavit also contained an assertion that the judge had, in connection with his previous duties, sponsored legislation providing for the deportation of alien Communists. Upon review of such an affidavit we do not hesitate to uphold the ruling of the court below that the affidavit should be stricken, for it does not establish bias and prejudice in the personal sense contemplated by the statute, assuming truth in all the facts stated. Prejudice, to require recusation, must be personal according to the terms of the statute, and impersonal prejudice resulting from a judge's background or experience is not, in our opinion, within the purview of the statute. *Hurd* v. *Letts, supra; Price* v. *Johnston*, 125 F. 2d 806 (C. C. A. 9th 1942), *cert. denied*, 316 U. S. 677 (1942); *Simmons* v. *United States*, 89 F. 2d 591 (C. C. A. 5th 1937), *cert. denied*, 302 U. S. 700 (1937); *Craven* v. *United States*, 22 F. 2d 605 (C. C. A. 1st 1927), *cert. denied*, 276 U. S. 627 (1928); *United States* v. *16,000 Acres of Land, More or Less, in LaBette County, Kansas*, 49 F. Supp. 645 (D. Kan. 1942).

The affidavit serves as a starting point for an effort to becloud the real issue in the case. Despite the fact that appellant was on trial for contempt of a Congressional investigating committee, and not for his political beliefs, the record shows repeated attempts by defense counsel to raise appellant's self-styled status as a "political refugee" and "German Communist" to a level of decisive importance in the case. During the course of the trial defense counsel sought to introduce evidence to show that the Committee's real purpose in summoning appellant was "to harass and punish him for his political beliefs . . . and that the Committee acted for ulterior motives not within the scope of its or Congress' powers." The lower court properly refused to admit such evidence, on the ground that the court had no authority to scrutinize the *motives* of Congress or one of its committees. It is beyond question, as the result of venerable Supreme Court decisions, that either House of Congress has power to issue process to compel private individuals to appear and give testimony, in aid of the legislative function. *McGrain* v. *Daugherty*, 273 U. S. 135 (1927); *Sinclair* v. *United States*, 279 U. S. 263 (1929).

Appellant was summoned to appear before the Committee in the same manner that many citizens of the United States had been previously summoned. The fact that he was arrested and escorted to the Committee hearing by federal officers did not mitigate his obligation to give testimony; the arrest, if actually unlawful as appellant contended, was a matter to be contested by appellant in a judicial proceeding, if he so desired, and was irrelevant to the proceedings before the Committee. The arrest was accomplished under Presidential warrant—the power of the Executive to order the arrest was subject to scrutiny by the Judiciary, which stood ready to guarantee due process of law had appellant desired to properly invoke judicial determination of that question. Consequently the repeated attempts by defense counsel to elicit testimony regarding the arrest were defeated, and properly so, in the trial court, for such evidence was immaterial to the issues in this case.

Although he is an alien, appellant stood before the Committee in much the same position as does any citizen of the United States. Once an alien lawfully enters and resides in this country he becomes invested with the rights, except those incidental to citizenship, guaranteed by the Constitution to all people within our borders. See Mr. Justice Murphy, concurring, *Bridges* v. *Wixon*, 326 U. S. 135, 161 (1945). Correlatively, an alien resident owes a temporary allegiance to the Government of the United States, and he assumes duties and obligations which do not differ materially from those of native-born or naturalized citizens; he is bound to obey all the laws of the country, not immediately relating to citizenship, and is equally amenable with citizens for any infraction of those laws. *Carlisle* v. *United States*, 16 Wall. 147 (U. S. 1872); *Leonhard* v. *Eley*, 151 F. 2d 409 (C. C. A. 10th 1945), and cases cited therein. The alien resident may be required to make contribution to the support of our Government; in *Leonhard* v. *Eley*, *supra*, and in *United States* v. *Lamothe*, 152 F. 2d 340 (C. C. A. 2d 1945), it was held that an alien may lawfully be inducted for national defense service in time of war. To continue exemplification of the general lack of discrimination against aliens, it has been held that an alien enemy under criminal prosecution in a United States civil court must be afforded the usual constitutional safeguards. *Shinyu Noro* v. *United States*, 148 F. 2d 696 (C. C. A. 5th 1945).

It follows, then, that appellant's lack of citizenship did not raise a bar to his being summoned by a Congressional investigating committee for aid in securing its purpose. We need not review here the question whether the inquiries pursued by this Committee are constitutionally lawful, which is raised by appellant, for this court and the Second Circuit Court of Appeals have recently examined the question at length and answered affirmatively. *Barsky* v. *United States*, 82 U. S. App. D. C. ——, 167 F. 2d 241 (1948); *Josephson* v. *United States*, 165 F. 2d 92 (C. C. A. 2d 1947), *cert. denied*, 333 U. S. —— (1948).

Having been summoned by lawful authority, appellant was bound to conform to the procedure of the Committee. *Townsend* v. *United States*, 68 App. D. C. 223, 95 F. 2d 352 (1938), *cert. denied*, 303 U. S. 664 (1938). It was established at the trial of this case by the testimony of the Chairman of the Committee that it was customary procedure to allow witnesses to state legal objections to the jurisdiction of the Committee before they were required to be sworn. Appellant attempted to argue that such was his purpose in seeking leave to "make a few remarks" before he was sworn. The record shows an outright refusal by appellant, when he was first called as a witness, to take the stand and give testimony; his refusal was later conditioned upon a request for time to "make a few remarks," but he did not at any time inform the Committee of his desire to state legal objections to the jurisdiction of the Committee. Testimony given at the trial by the Committee Chairman and the Committee's chief investigator showed that appellant conveyed the impression he would consume much more than the 3 minutes he requested if he were allowed time for preliminary remarks, since he held what appeared to be a lengthy mimeographed statement, which was later distributed to the press as appellant left the hearing room. Appellant's request for time to make preliminary remarks was treated in accordance with

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Committee procedure: the Chairman promised time for such remarks at the conclusion of Committee questioning. It is important to note that appellant was accompanied to the hearing by his legal counsel, who testified at the trial that she was familiar with the course of practice before Congressional investigating committees and had advised appellant, prior to his appearance before the Committee, regarding hearing procedure.

The profession of good faith by appellant regarding his refusal to comply with the demands of the Committee avails him nothing since there was ample evidence to demonstrate that his refusal was deliberate and intentional, which is sufficient to constitute a violation of the statute involved here. *Fields* v. *United States*, 82 U. S. App. D. C. ——, 164 F. 2d 97 (1947), *cert denied*, 332 U. S. 851 (1948). A person summoned to appear before a Congressional committee may refuse to answer questions and submit to a court the correctness of his judgment in doing so, but a mistake of law is no defense, for he is bound to rightly construe the statute involved. *Townsend* v. *United States*, *supra*. Had appellant taken the oath and submitted to interrogation, in orderly fashion and in conformity with the rules and practices of the Committee (applicable to citizens and aliens alike), he could properly raise the question at any time as to whether the Committee, by any particular inquiry directed to him, was then actually exceeding proper constitutional limitations. *Sinclair* v. *United States*, *supra*; *McGrain* v. *Daugherty*, *supra*; *In re Chapman*, 166 U. S. 661, (1897); *Kilbourn* v. *Thompson*, 103 U. S. 168 (1880). Appellant could not impose his own conditions upon the manner of inquiry, and the trial court rightly instructed the jury to that effect.

The request made of the appellant by the Committee Chairman that he should be "sworn in" was the usual practice preceding testimony by a witness. Appellant's replies show he explicitly acknowledged the request as nothing more than that, and that his refusal to be sworn as a witness effectively constituted a refusal to give testimony, except upon conditions which he was not entitled to interpose. We think the indictment[8] sufficiently stated an offense, and find no solid ground for the contention advanced that if this indictment be upheld then one who for conscientious scruples insisted on affirming rather than swearing could likewise be indicted and convicted, since the indictment does not negative a willingness to affirm. Rule 7 (c) of the Federal Rules of Criminal Procedure requires only that the indictment contain "a plain, concise and definite written statement of the essential facts constituting the offense charged." The indictment returned in this case sufficiently met that requirement, and there was no attempt to prosecute appellant for refusing to take an oath, except insofar as that act represented refusal to give testimony before the

[8] The indictment, after citing the authority for the creation of the Committee, charged:

> "Gerhart Eisler, having been summoned as a witness by the authority of the House of Representatives, through its Committee on Un-American Activities, to give testimony before the said Committee at its session within the District of Columbia on February 6, 1947, upon matters of inquiry committed to said Committee by Public Law No. 601, Section 121, and aforesaid Resolution 5, did appear before the said Committee, on February 6, 1947, and was directed to be sworn to testify upon said matters, and the said Gerhart Eisler thereupon failed and refused so to be sworn to testify, and thereby on February 6, 1947, within the District of Columbia, willfully did make default."

Committee. There was no objection raised by appellant to his taking an oath; indeed, appellant expressly stated his willingness to take an oath if the Committee would accede to the conditions he sought to impose.

It is further contended on behalf of appellant that he appeared before the Committee in the status of an interned enemy alien and as such could not be required to give testimony on any matter of consequence to the Committee. But the arrest of appellant by security officers of the Immigration and Naturalization Service did not nullify the subpoena previously issued in a lawful manner by the Committee. And if the detention of appellant amounted to internment and hence clothed him with the protection of Article 5, *Geneva Convention on Prisoners of War*,[9] we cannot indulge the presumption that the Committee would violate whatever rights were secured to appellant by virtue of Article 5.[10] Appellant, by his conduct before the Committee, refused to be sworn or to answer any questions whatsoever, and is thereby precluded from enjoying the benefit of what force there might be in this argument. "The mere possibility that the power of inquiry may be abused 'affords no ground for denying the power.'" *Barsky* v. *United States*, *supra*, 167 F. 2d 241, 250, citing *McGrain* v. *Daugherty*, 273 U. S. 135, 175 (1927).

Appellant contends that he did not receive a fair trial, raising the contention initially on the basis of the entire record, which we have carefully examined, although we do not sanction such a general averment. As a result of that examination we conclude that appellant did receive a fair trial. The specific averments of hostility and bias on the part of the trial judge set forth by appellant actually indicate, in our opinion, proper attempts to confine the trial of the case to the pertinent issues presented. Defense counsel persistently attempted to adduce immaterial and irrelevant evidence, and the fact that a great number of rulings adverse to appellant were naturally elicited from the trial court contributes nothing to an assertion of hostility and bias. The judge is invested with authority to control the trial procedure, and it is his duty to restrict the evidence to the issues of the case. The collateral contention that the trial judge unduly intervened in the examination and cross-examination of witnesses evokes restatement of a portion of this court's opinion in *Griffin* v. *United States*, 82 U. S. App. D. C. ——, ——, 164 F. 2d 903, 904: ". . . few rules are better settled, so far as the federal courts are concerned, than the right of a trial judge to make proper inquiry of any witness when he deems that the end of justice may be served thereby and for the purpose of making the case clear to the jurors." There was no violation of that right in the trial below; we find no instance among those complained of where the trial judge's intervention in the questioning by counsel was improper or not obviously calculated to make the case clear to the jurors.

Our review of the record in this case has failed to disclose compelling reasons for reversing the judgment of the District Court. Accordingly, the judgment is affirmed.

Affirmed.

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9 47 STAT. 2030 (1929).

10 Article 5 contains the following provision: "No coercion may be used on prisoners to secure information relative to the condition of their army or country. Prisoners who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind whatever." 47 STAT. 2031 (1929).

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PRETTYMAN, J., *dissenting:*

I disagree with my brethren and, because of the nature of the case, think I should state the critical points upon which I would reverse the judgment below:

I

I think that the affidavit of bias and prejudice filed by the appellant in the trial court was sufficient under the statute to require the disqualification of the judge to whom it was addressed, and that the affidavit was filed in time.

The affidavit says:

> "b) . . . . At a hearing of the Un-American Activities Committee on February 6, 1947, out of which this very cause arose there was placed into the record a statement of J. Edgar Hoover, director of the Federal Bureau of Investigation which was allegedly a report of an investigation of my activities by the Federal Bureau of Investigation over many years. Moreover, this report is set forth in full at pages 11-12 of the Committee hearings of February 6, 1947. This report indicates strong personal bias and prejudice against me. During the period of the investigation and until his elevation to the bench in September, 1945, Justice Holtzoff acted as special assistant to the Attorney General assigned to the Federal Bureau of Investigation. His duties were concerned especially with the investigation by the F.B.I. into the activities of aliens and communists, into both of which categories I fall. . . .
>
> . . . . . .
>
> "d) In connection with his duties as United States attorney assigned to the F.B.I., Justice Holtzoff advised J. Edgar Hoover as to steps and actions to be taken against alien communists, such as myself. . . .
>
> "e) . . . . Justice Holtzoff was legal advisor to the F.B.I. at the time the investigation of me was commenced and continued as such until September, 1945. Upon information and belief, he figured in an important capacity in advising and aiding and determining the policy, nature, scope and objectives of the investigation directed against aliens and communists, which necessarily included myself."

In sum, the affidavit says that prior to his elevation to the bench the trial judge had been the active legal advisor to the investigator in the very investigation out of which this case arose, which investigation involved this appellant, among others.

The statute is quite succinct and clear:

> "Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, ..."[1]

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[1] 36 STAT. 1090 (1911), 28 U. S. C. A. § 25 (1927).

It is established that upon the filing of an affidavit under this statute the court may determine the legal sufficiency of the affidavit upon the facts as stated but may not give any consideration to the truth or falsity of the alleged facts; the alleged facts must be assumed to be true.[2]

So the simple question here is whether the fact that the trial judge had been the active legal advisor to the investigator in the very investigation which gave rise to the indictment of the defendant, is legally sufficient as a basis for a belief of personal bias. I think it clearly is.

In *Barsky* v. *Holtzoff*[3] we held almost identical allegations to require the disqualification of the judge. This case is not like *Lawson* v. *Curran*,[4] in which there was merely a general allegation that the judge had prosecuted cases involving similar offenses.

Many able and conscientious lawyers and judges—and the trial judge here involved is certainly both—have a deep and abiding conviction of their own abilities to prosecute impersonally and to judge impersonally, and to do both in the same case. But such psychological detachment is not so well established that a belief to the contrary is unreasonable. That a judge has been the prosecutor in the early stages of a particular case against a particular individual is a fact "from which a sane and reasonable mind might fairly infer personal bias or prejudice on the part of the judge." *Hurd* v. *Letts*, 80 U. S. App. D. C. 233, 234, 152 F. 2d 121, 122 (1945). In the case just cited, this court established that test for disqualification.[5] The statute says "bias *or* prejudice", evidently meaning to include bent of mind as well as aggressive antipathy.

The statute[6] speaks of filing ten days before the term of court, but that provision was designed for district courts which have periodical terms and in which the identity of the trial judge is known well in advance. In this jurisdiction, the District Court consists of twelve judges who serve in rotation, or upon assignment, in the several branches of the court. The court is in continuous session, except for the summer. Thus, the name of the trial judge may not be known until shortly before the trial; as a matter of fact, several different methods of assigning criminal cases for trial have been experimented with in recent years. It is settled that in this jurisdiction the ten-day provision of the statute is impractical in application and, instead, the rule of "due diligence" must be applied.[7] This is permissible under the clause of the statute which excepts from the ten-day requirement cases in which "good cause shall be shown for the failure to file it within such time."

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2 Berger v. United States, 255 U. S. 22, 65 L. Ed. 481, 41 S. Ct. 230 (1921); Scott v. Beams, 122 F. 2d 777, 788 (C. C. A. 10th 1941), and cases cited; Mitchell v. United States, 126 F. 2d 550 (C. C. A. 10th 1942).

3 Misc. No. 126, U. S. App. D. C., June 11, 1947 (petition for mandamus granted).

4 Misc. No. 142, U. S. App. D. C., April 13, 1948 (petitions for mandamus and for leave to file petition for writ of prohibition denied).

5 Upon the general subject, *see* Frank, *Disqualification of Judges*, 56 YALE L. J. 605, 626 *et seq.* (1947).

6 *Supra* note 1.

7 While not expressly recited as "due diligence", this has been the doctrine underlying cases such as *Hurd* v. *Letts*, *supra*, and *Laughlin* v. *United States*, 80 U. S. App. D. C. 101, 151 F. 2d 281 (1945).

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Appellant and his counsel first knew on May 20, 1947, of the assignment of this case to Judge Holtzoff for trial.[8] Appellant was in New York. His principal attorneys were in Washington. On that same day he inquired of them whether he was obliged to go to trial before Judge Holtzoff, in view of the judge's previous connections with the F.B.I. Counsel arranged to discuss the matter in Washington on May 23rd. They did so, but the principal counsel received a wire during that morning announcing the sudden death of his brother. This disrupted the conference, and, as a matter of fact, on that basis the court continued the trial to June 4th. The affidavit was finally executed in New York on May 28th and was filed here on May 29th. The trial was actually begun on June 4th.

It seems to me that under the foregoing circumstances the filing of the affidavit nine days after the identity of the trial judge was ascertained came within "due diligence". There was an unforeseeable and unavoidable interruption during those nine days. The affidavit was filed six days before the trial, and other judges were available so that the trial would not have been delayed. Affiant could well have known that with twelve active judges on this District Court, no delay in trial would result from the disqualification of one of them. Moreover, these affidavits should be prepared with the utmost care and certainty as to the facts. The courts should encourage careful consideration and deliberation on the part of counsel. It seems to me to be a grave mistake to hold that such affidavits must be filed almost instantaneously after the identity of the trial judge is ascertained. Such a rule will almost make mandatory the filing of the affidavit without deliberate and careful consideration of counsel. The rule ought to be that they be filed with the utmost deliberation consistent with the undelayed dispatch of the business of the court.

II

I think the court erred in refusing to permit appellant to prove what he intended to say to the Committee when he asked for three minutes before being sworn.[9]

Appellant was convicted of violation of Section 192, Title 2, of the United States Code.[10] That statute is in two parts.[11] The first relates to a person who having been summoned as a witness "upon any matter under inquiry" before a committee of Congress, "willfully makes default". The second part refers to a person who, having appeared as a witness, "refuses to answer any question pertinent to the question under inquiry". The indictment against appellant

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[8] Appellee Government says that the date is not shown in the record but says that appellant "concedes" and "admits" that it was "about" May 20th.

[9] The Government says that appellant was permitted to answer, but the record, at pages 133 to 135 of the printed appendix before us, shows plainly that he was not, and his proffer of proof was denied. The denial was repeated (pages 138, 139 and 149 of the appendix). The Government also attempts to show that in the requested three minutes appellant intended to attempt to read a 20-page mimeographed statement, but the evidence is perfectly clear that that statement was prepared to be read after the witness had testified, and contemplated that he would have been sworn. The proffer of proof indicated that he also had a few written notes, relating to legal objections, which he intended to use in the three minutes.

[10] R. S. § 102 (1857), as amended, 52 STAT. 942 (1938).

[11] United States v. Murdock, 284 U. S. 141, 76 L. Ed. 210, 52 S. Ct. 63 (1931).

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charged that, having been summoned as a witness to give testimony before the Committee "upon matters of inquiry committed to said Committee . . ., [he] did appear before the said Committee . . . and was directed to be sworn . . . and . . . thereupon failed and refused so to be sworn to testify, and thereby . . . willfully did make default." Thus, the indictment was for willfully making default. "Willfully" in this statute means deliberately or intentionally.[12]

The Chairman of the Committee evaded answering the questions of defense counsel as to the procedure which the Committee had established in respect to the notation of legal objections, but the plain inference of his testimony is that the established procedure was to allow a witness to make his legal objections before being sworn. The purport of appellant's offer of proof was that he had intended to interpose legal objections to being compelled to testify. That proffer must be viewed in the setting of the Committee hearing. The testimony of the Committee Chairman was that the Committee room was "jammed packed with people", and the chief investigator of the Committee testified that there were quite a few photographers present taking photographs. The entire colloquy, which takes a little less than two pages of print, could hardly have taken more than a few minutes. It is true that appellant did state that he was not going to take the stand and refused to be sworn, but he said twice, "I am ready to answer all questions," and twice he said, "I do not refuse to be sworn." Twice he said that he wanted to speak before he was sworn, and twice he quite definitely said that he wanted only three minutes.

If it was the established practice that legal objections be stated by the witness before he was sworn, and if appellant could prove that all he wanted to do was to state his legal objections and thereafter be sworn and "answer all questions", I do not see how he could be held guilty of "willful" default. While bad faith is not an element of willfulness, intent is. Appellant was entitled to prove that he had no intent to refuse to testify but merely wanted to follow the established practice.

The trial court made some reference to appellant's position being that he wished to impose conditions upon his testifying, but I see no merit in that suggestion, if, as a matter of fact, appellant was merely attempting to comply with the established procedure.

III

I also think that judgment of acquittal should have been directed on the ground that the Government failed to prove that appellant was summoned to testify in a matter of inquiry submitted to the Committee by the Congressional Resolution. This record does not show, and we do not yet know, what it was that the Committee wanted appellant to testify about. The subpoena merely directed the marshal to summon him "to testify touching matters of inquiry committed to said Committee"; it did not describe or name any such matter. He was not told by anybody, so far as the record shows, what the matters were concerning which he was to testify. There is no shred of evidence that he was summoned as a witness upon a matter under inquiry before the Committee, but the statute requires that he must have been summoned upon such a matter. The necessity of proof on the

[12] Fields v. United States, 82 U. S. App. D. C. ——, 164 F. 2d 97, 100 (1947).

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point seems to me to be an unavoidable conclusion from the constitutional principles laid down in *Kilbourn* v. *Thompson*,[13] *McGrain* v. *Daugherty*,[14] and *Sinclair* v. *United States*.[15]

The Government says that *Josephson* v. *United States*[16] disposes of this point. But it does not. The Second Circuit was exceedingly meticulous about it. Josephson was not indicted for default; he was indicted, under the second part of the statute, for refusing to answer pertinent questions. Therefore, the court held, expressly and carefully, that no question of willfulness was involved and that the refusal to answer any question was a refusal to answer any pertinent question. We do not have that situation here.

IV

I do not share the view of my brethren in respect to the general conduct of the trial. It is not possible in the short space of an opinion to relate all the incidents which occurred during the course of the trial, and severally and alone they might not constitute ground for reversal, but, when coupled with the considerations already discussed, they make certain the necessity of reversal, in my opinion.

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[13] 103 U. S. 168, 26 L. Ed. 377 (1881).
[14] 273 U. S. 135, 71 L. Ed. 580, 47 S. Ct. 319 (1927).
[15] 279 U. S. 263, 73 L. Ed. 692, 49 S. Ct. 268 (1929).
[16] 165 F. 2d 82 (C. C. A. 2d 1947).

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[fol. 246] [Stamp:] United States Court of Appeals for the District of Columbia. Filed June 14, 1948. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, APRIL TERM, 1948

No. 9582

GERHART EISLER, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the District of Columbia

Before: Clark, Prettyman and Proctor, JJ.

JUDGMENT

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Per Mr. Justice Clark.

Dated June 14, 1948.

Dissenting opinion by Mr. Justice Prettyman.

[fol. 247] [Stamp:] United States Court of Appeals for the District of Columbia. Filed June 19, 1948. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 9582

GERHART EISLER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

PETITION FOR REHEARING

Comes now the appellant by his counsel and petitions for a rehearing in the above-captioned case on the following grounds:

1. The majority opinion states "that it was customary procedure to allow witnesses to state legal objections to the jurisdiction of the Committee before they were required to be sworn." Accordingly, if all the appellant wished to do was to make a legal objection before being sworn, he could not be found guilty. Since appellant was entitled under the constitution to a trial by jury, under the majority opinion, appellant was entitled to have the jury decide whether he wished to make a legal objection.

But the trial court did not permit the jury to decide the issue. The trial court excluded evidence on this point (J.A. 122, 126, 133, 134, 135, 138, 139, 146, 149, 150); refused to charge the jury that the appellant should be acquitted, if he wished only to make a legal objection (J.A. 180), and in essence instructed the jury that the defendant did not wish to make a legal objection but instead refused to be sworn (J.A. 173, 177).

[fol. 248] Thus, the issue at this stage is not, as the majority opinion would appear to indicate, whether there was evidence to support a jury decision that the appellant did not wish to make a legal objection. The issue is rather whether the appellant was denied an opportunity to prove his contention and have the jury pass on it. Clearly, if, as the majority opinion holds, the appellant was entitled to make a legal objection before being sworn, then he was

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entitled to have the jury decide the fact as to whether or not he was making such legal objection. The refusal by the trial court to permit the jury to pass on the facts was a denial of due process and of trial by jury as guaranteed by the Fifth and Sixth Amendments to the Constitution.

2. The majority opinion rightly holds "that either House of Congress has power to issue process to compel private individuals to appear and give testimony *in aid of the legislative function.*"[1] Clearly, therefore, one charged with contempt of Congress is entitled to defend on the ground that he was not summoned to give testimony in aid of the legislative function. But this right was denied the appellant by the trial court, when the court refused to permit proof that the appellant was not summoned to give testimony in aid of the legislative function, but for other purposes beyond the power of Congress. (J.A. 101, 102, 104, 119, 120). This is not a question of scrutinizing the motives of Congress or one of its committees as assumed by the majority opinion. It is simply a question of the clear right of the appellant to prove as a defense that the committee was not acting in aid of a legislative function, but was acting [fol. 249] beyond the powers granted to Congress by the Constitution. This error in denying to appellant the opportunity to prove that he was not summoned to testify in aid of the legislative function was further compounded by the failure, as pointed out by the dissent, of the Government to prove that he was summoned to testify on a matter under inquiry by the committee.

3. The majority opinion did not discuss or consider the case of *Barsky* v. *Holtzoff*, decided by this Court unanimously on June 11, 1947. Yet the majority opinion is squarely in conflict with the decision in that case. A reading of the record in that case indicates that it should be controlling in this case and in fact was so considered by Justice Prettyman who was the only member of this court who sat on that case.

4. The majority opinion did not consider the contention that the trial court erred in refusing to permit appellant to prove what he intended to say to the Committee when he

---

[1] Italics supplied.

asked for three minutes before being sworn (brief, at p. 39). Although not considered at all by the majority, this contention was considered sufficiently important by the dissent to require reversal.

5. The majority opinion did not consider the contention that the Government failed to prove that appellant was summoned to testify in a matter of inquiry submitted to the Committee by Congress (brief, at p. 46; reply brief, at p. 10). Although not considered at all by the majority, this contention was considered sufficiently important by the dissent to require a judgment of acquittal.

6. The majority opinion did not consider the contention that the trial court erred in that it made inconsistent rulings on evidence prejudicial to the appellant. The trial court [fol. 250] allowed the prosecution to examine on and argue concerning certain subjects, while denying to the defense the opportunity to introduce evidence thereon. (brief, pp. 29-30). For example, the majority opinion considered it important to note that appellant was accompanied by legal counsel, but did not comment on the refusal of court to permit testimony to the effect that counsel had instructed appellant to make his own legal objection, since under committee practice counsel would not be permitted to speak (J.A. 107, 146, 149, 150).

7. The majority opinion did not consider the contention that the trial court erred by refusing to permit defense counsel to object to the trial court's charge out of the hearing of the jury, in violation of Rule 30 of the Rules of Criminal Procedure (brief, at p. 31; reply brief, at pp. 6-7).

8. The majority opinion did not consider the contention that the trial court erred in that its charge was equivalent to directing a verdict of guilty (brief, pp. 37-38; reply brief, p. 8).

9. The majority opinion did not consider the contention that the trial court erred by refusing requested charges to the effect that the jury should acquit if it found that the appellant had merely attempted to make a legal objection to the Committee's requiring him to be sworn and to testify (brief, pp. 39-40; reply brief, pp. 8-9).

We respectfully submit that all of these considerations require a rehearing by the Court and we request oppor-

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tunity to argue orally on the questions raised in this petition.

David Rein, Abraham J. Isserman, Attorneys for appellant.

[fol. 251] Certification of Service

I hereby certify that I have served the within and foregoing Petition for Rehearing in the above entitled cause upon William Hitz, Assistant United States Attorney, by enclosing a true and correct copy thereof and depositing the same in the United States mails at Washington, D. C., on June 19th, 1948.

David Rein, Attorney for Appellant, 1105 K Street N.W., Washington, D. C.

[fol. 252] [Stamp:] United States Court of Appeals for the District of Columbia. Filed July 17, 1948. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, APRIL TERM, 1948

No. 9582

GERHART EISLER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

Before Clark, Prettyman and Proctor, JJ

ORDER

On consideration of appellant's petition for rehearing herein, It is

Ordered by the Court that the petition for rehearing be, and it is hereby, denied.

Per Curiam.

Dated July 17, 1948.

[fol. 253] [Stamp:] United States Court of Appeals for the District of Columbia. Filed August 24, 1948. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, APRIL TERM, 1948

No. 9582

GERHART EISLER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

DESIGNATION OF RECORD

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint appendix to brief.
2. Opinion.
3. Judgment.
4. Petition for rehearing.
5. Order denying petition for rehearing.
8. This designation.
9. Clerk's certificate.

David Rein, Attorney for Appellant.

Certification of Service

I hereby certify that I have served the within and foregoing Designation of Record in the above-entitled cause upon William Hitz, Assistant United States Attorney, by enclosing a true and correct copy thereof and depositing the same in the United States mails at Washington, D. C., on August 24, 1948.

David Rein.

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[fol. 254] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered from 1 to 253, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties and of the proceedings of the said Court of Appeals as designated by counsel for appellant in the case of: Gerhart Eisler, Appellant, vs. United States of America, Appellee, No. 9582, April Term, 1948, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this thirty-first day of August, A. D. 1948.

Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia. By C. Preston Gainor, Assistant Clerk. (Seal.)

[fol. 255] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. —

GERHART EISLER, Petitioner,

vs.

UNITED STATES OF AMERICA

ORDER

Upon consideration of the application of counsel for the petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 1st, 1948.

Fred M. Vinson, Chief Justice of the United States.

Dated this 2nd day of August, 1948.

[fol. 256] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 8, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Burton took no part in the consideration or decision of this application.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 255

GERHART EISLER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

DAVID REIN,
ABRAHAM J. ISSERMAN,
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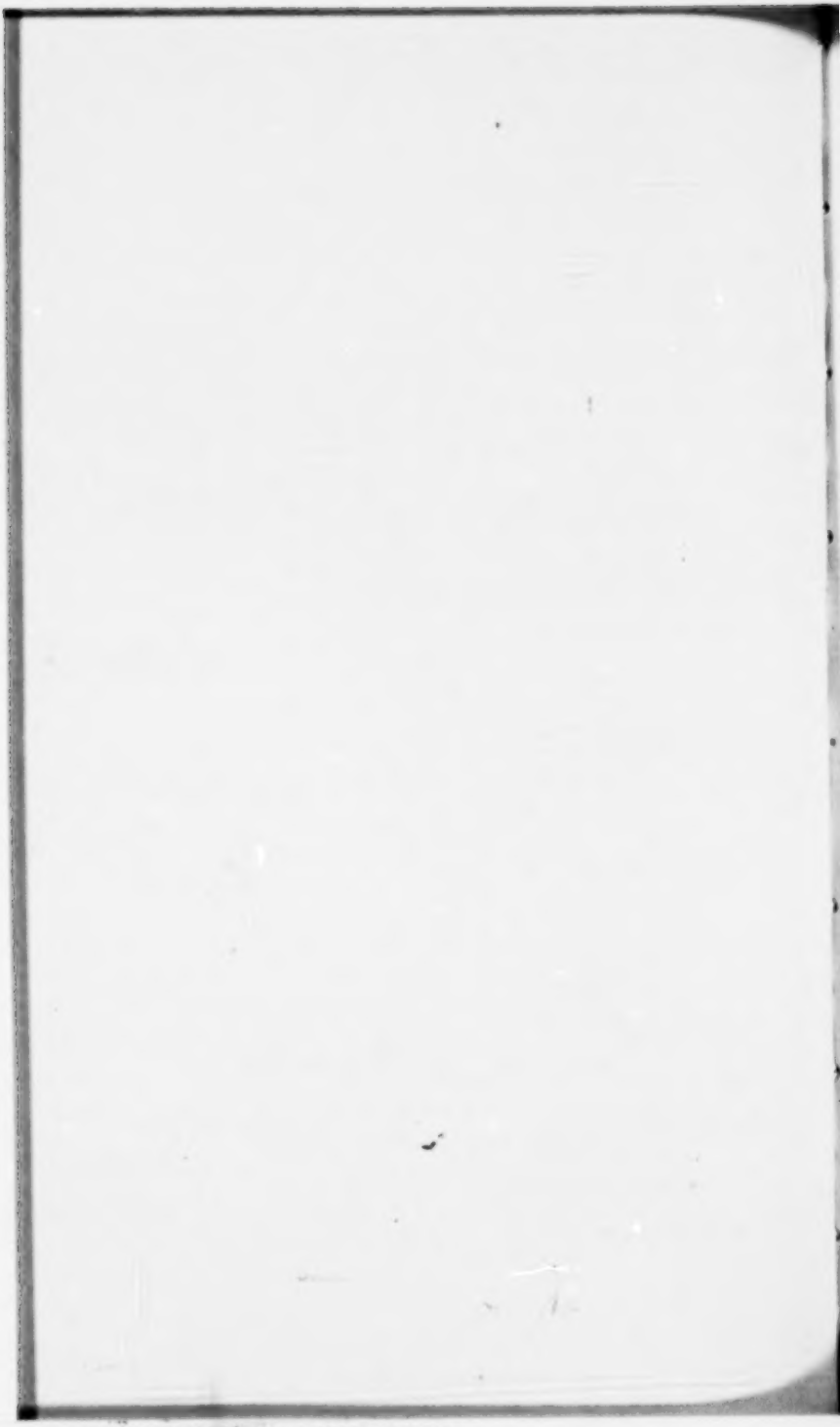
Washington 5, D. C.;
CAROL KING,
220 Broadway,
New York 7, New York;
JOSEPH FORER,
1105 K Street, N. W.,
Washington 5, D. C.,
Counsel for Petitioner.



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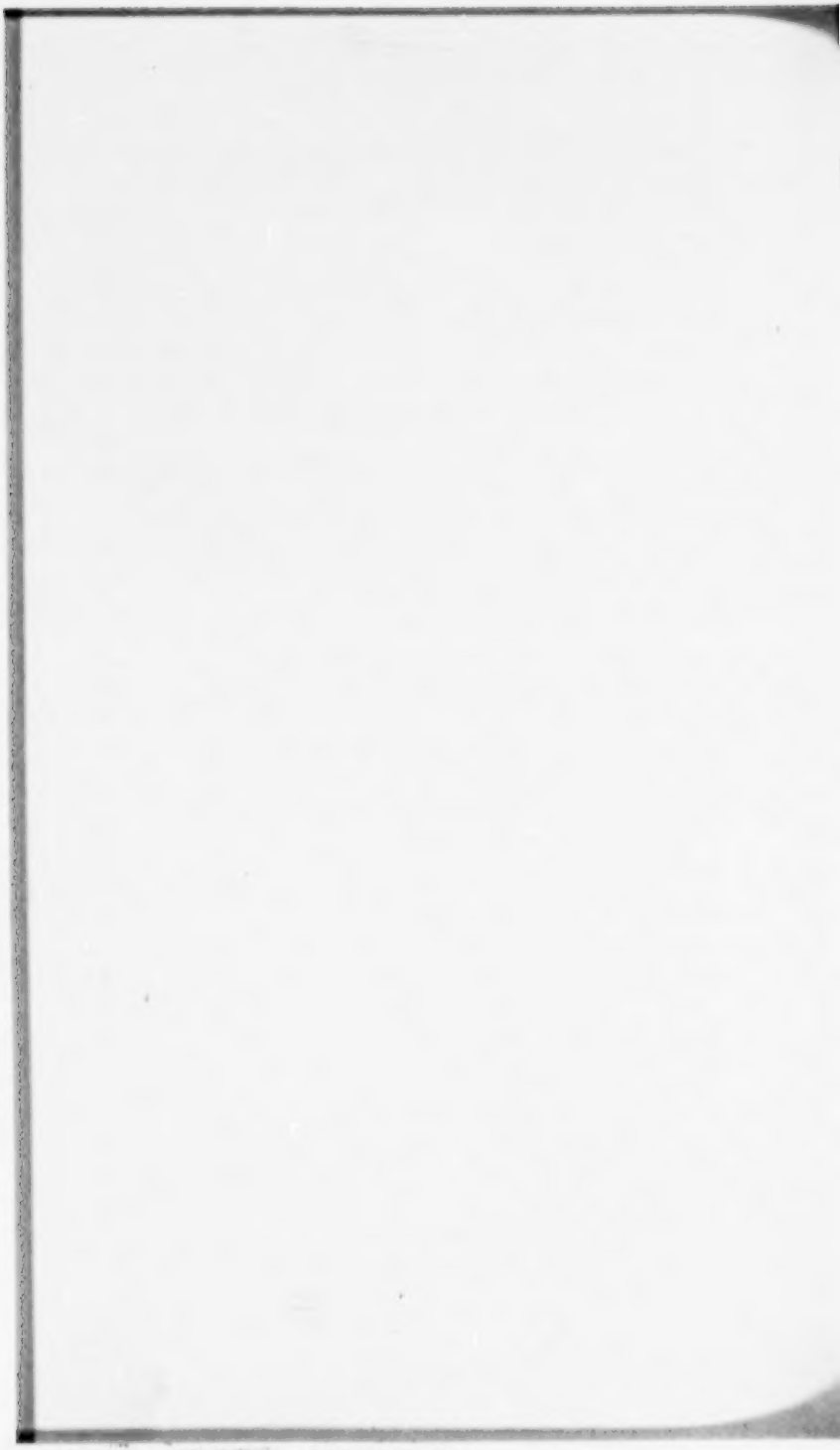

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 255

GERHART EISLER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Gerhart Eisler prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia affirming the judgment of the United States District Court for the District of Columbia, adjudging the petitioner guilty after conviction and imposing sentence under Rev. Stats. § 102, as amended by Act of June 22, 1938, c. 594, 52 Stat. 942, U. S. C. title 2, § 192.

Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia has not yet been officially reported. It appears in the record at 233-245.

Summary Statement of Matter Involved

Gerhart Eisler, the petitioner herein, is an Austrian national (R. 117), a member of the German Communist Movement (R. 222), who came to the United States in June, 1941 as a political refugee en route to Mexico under a transit visa (R. 113, 144). At the trial, the Court excluded evidence proffered to prove that Eisler was detained in this country against his will by the government's cancellation of his transit visa and its refusal to grant his numerous requests for permission to leave the country (R. 95-98, 115, 116).

On January 24, 1947, the House Committee on Un-American Activities served a subpoena requiring Eisler to appear before the Committee in Washington on February 6, 1947 (J. A. 13, 22, 23). Thereafter, Eisler prepared for his forthcoming appearance by conferring with counsel, preparing a statement, buying railroad tickets to Washington for himself and his wife, and making Washington hotel reservations (R. 122, 110, 111).

On February 4, 1947, Eisler was arrested in New York as an "enemy alien" by two security officers of the Immigration and Naturalization Service of the Department of Justice (R. 80, 81, 82, 123). At the trial, the Court excluded evidence proffered to prove that this arrest was illegal, in that (a) Eisler was, as the Department of Justice knew, an Austrian national and hence not an enemy alien, (b) the arresting officers neither had nor exhibited a warrant of arrest, and (c) the government had earlier discontinued the arrest and internment of enemy aliens (R. 80, 82, 87-92, 98, 102, 108, 109). The Court also excluded evidence offered to prove that this illegal arrest was instigated by the Un-American Activities Committee of the House of Representatives for the purpose of having him brought before the Committee and to punish him for his political beliefs and to

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prevent his departure from the United States and his return to Germany (R. 79, 80, 88-90, 100-102, 124, 213).

Eisler was taken by the arresting officers to Ellis Island (R. 124), and on the next day (February 5) was taken, still in the custody of the Immigration officers, to Washington, D. C. There he was confined in the District jail overnight (R. 83, 125). On February 6, 1947, he was taken in the same custody, to the hearing room of the Committee on Un-American Activities (R. 13, 30, 85). During the hearing he was still in custody (R. 81).

At the hearing, the following occurred (read into the record from a transcript of the hearing (R. 43-37)):

> The Chairman.[1] Now, Mr. Stripling, call your first witness.
>
> Mr. Stripling: Mr. Gerhart Eisler, take the stand.
>
> Mr. Eisler: I am not going to take the stand.
>
> Mr. Stripling: Do you have counsel with you?
>
> Mr. Eisler: Yes.
>
> Mr. Stripling: I suggest that the witness be permitted counsel.
>
> The Chairman: Mr. Eisler, will you raise your right hand?
>
> Mr. Eisler: No. Before I take the oath——
>
> Mr. Stripling: Mr. Chairman——
>
> Mr. Eisler: I have the floor now.
>
> Mr. Stripling: I think, Mr. Chairman, you should make your preliminary remarks at this time, before Mr. Eisler makes any statement.
>
> The Chairman: Sit down, Mr. Eisler.
>
> Now, Mr. Eisler, you will be sworn in. Raise your right hand.
>
> Mr. Eisler: No.
>
> The Chairman: Mr. Eisler, in the first place, you want to remember that you are a guest of this Nation.
>
> Mr. Eisler: I am not treated as a guest.

---

[1] The Chairman of the hearing was Representative J. Parnell Thomas (R. 13, 14). Mr. Stripling is the Committee's Chief Investigator (R. 26). Mr. Mundt and Mr. Rankin are members of the Committee.

The Chairman: This committee——

Mr. Eisler: I am a political prisoner in the United States.

The Chairman: Just a minute. Will you please be sworn in?

Mr. Eisler: You will not swear me in before you hear a few remarks.

The Chairman: No; there will be no remarks.

Mr. Eisler: Then there will be no hearing with me.

The Chairman: You refuse to be sworn in? Do you refuse to be sworn in, Mr. Eisler?

Mr. Eisler: I am ready to answer all questions, to tell my side.

The Chairman: That is not the question. Do you refuse to be sworn in? All right.

Mr. Eisler: I am ready to answer all questions.

The Chairman: Mr. Stripling, call the next witness. The committee will come to order, please. What is the pleasure of the committee?

Mr. Stripling: Mr. Chairman, I think that the witness should be silent, or take the stand or be removed from the room, one or the other, until this matter is determined.

Mr. Mundt: Mr. Chairman, suppose you ask him again whether he refuses to be sworn.

Mr. Rankin: Not 'sworn in' but to be sworn.

The Chairman: Mr. Eisler, do you refuse, again to be sworn?

Mr. Eisler: I have never refused to be sworn in. I came here as a political prisoner. I want to make a few remarks, only 3 minutes, before I be sworn in, and answer your questions, and make my statement. It is 3 minutes.

The Chairman: I said that I would permit you to make your statement when the committee was through asking questions. After the committee is through asking questions, and your remarks are pertinent to the investigation, why it will be agreeable to the committee. But first you have to be sworn.

Mr. Eisler: That is where you are mistaken. I have to do nothing. A political prisoner has to do nothing.

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The Chairman: Then you refuse to be sworn.

Mr. Eisler: I do not refuse to be sworn. I want only 3 minutes. Three minutes to make a statement.

The Chairman: We will give you those 3 minutes when you are sworn.

Mr. Eisler: I want to speak before I am sworn.

Thus, it is clear that, although the petitioner wished to make a three-minute statement before being sworn, he was ready and willing to be sworn and to testify.

The Committee then voted to cite Eisler for contempt (R. 52, 53).

On February 27, 1947, an indictment was filed charging that Eisler failed and refused to be sworn to testify before the Committee, "and thereby on February 6, 1947, within the District of Columbia, willfully did make default" (R. 214, 215). Eisler was arraigned before Chief Justice Laws on April 22 (R. 230). Immediately prior to the arraignment, Carol King was admitted by Chief Justice Laws to the bar of the Court *pro hac vice*, and entered her appearance as counsel of record for the petitioner (R. 229, 230).

On May 23, 1947, the motion to dismiss the indictment was argued before and denied by Justice Holtzoff (R. 4, 221). On May 29, Eisler filed an affidavit alleging bias and prejudice on the part of Justice Holtzoff (R. 222-226). The affidavit was accompanied by a certificate of Carol King, counsel of record, that it was made in good faith and not for hindrance or delay (R. 226). The affidavit recited, in substance, that Justice Holtzoff had, while legal adviser to the FBI, participated in FBI investigations of aliens and Communists, including an investigation of Eisler, who is an alien Communist, and also that Justice Holtzoff had a personal hatred of Communists, as shown by his sponsoring of anti-Communist legislation and his friendship with and admiration of J. Edgar Hoover, who has used highly intemperate language regarding Communists.

The affidavit further stated that the affiant and his counsel had first learned on May 20, 1947 that Justice Holtzoff was to try the case; that on the same day the petitioner asked his New York counsel if he was obliged to go to trial before Justice Holtzoff in view of the Justice's previous connections with the FBI; that New York counsel arranged to discuss on May 23 in Washington, D. C. with Washington counsel, the possibility of filing such an affidavit, but that because of the sudden death of the chief trial counsel's brother on May 23, the conference had to be postponed till May 27. The affidavit was executed in New York City on May 28, 1947.

The trial began on June 4, 1947 (R. 3, 231) before Justice Holtzoff, who on that day, struck the affidavit of prejudice and refused to disqualify himself (R. 3-6). Thereafter, Justice Holtzoff presided throughout the trial, gave sentence, and signed the judgment (R. 232).

During the course of the trial, the trial court continuously reprimanded and harassed defense counsel, both in and out of the presence of the jury (e.g., R. 33-35, 42, 45-46, 50-52, 54, 91, 92, 95, 96, 108, 109, 133-5, 136). Limitation of space will permit us to give only two brief examples:

> (1) Mr. Isserman: I ask that that remark be stricken as not being responsive.
>
> The Court: It may be stricken. Just state your motion; do not argue.
>
> Mr. Isserman: I have not argued; I just stated my ground. (R. 42)

> (2) By Mr. Isserman:
>
> Q. Mr. McInerny, I now ask you whether or not Defendant Gerhart Eisler from his arrival in the United States in June, 1941, applied for any change of status from his status as to being here on a transit visa, up to and including February 4, 1947?
>
> Mr. Hitz: I object.
>
> The Court: Objection sustained.

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Mr. Isserman: I offer to prove that this witness, if allowed to answer, would state that the defendant, Gerhart Eisler, never applied for change in status.

The Court: Well, you mean you expect him to say no. That is the offer of proof.

Mr. Isserman: No.

The Court: Because your question calls for a yes or no answer.

Mr. Isserman: May I have the question read, please?

The Court: No, you may proceed.

Mr. Isserman: Well, Your Honor, I would like to——

The Court: You ought to know how to make an offer of proof.

Mr. Isserman: I am asking the stenographer to tell me what I asked. I want to make sure the defendant's point is covered.

The Court: You may do it this time but don't do it again. You ought to know your own question (R. 95-96).

The trial court itself acknowledged that its conduct would and did prejudice the petitioner before the jury (R. 51, 190). The court stated to defense counsel (R. 51), early in the trial: "If you are not going to be urbane and courteous, I shall the next time I have to call attention to the fact do it in the presence of the jury." And in justification of its conduct during the trial, the court said in the course of the argument on the motion for new trial: "If counsel oversteps the bounds, I think the Court has a right to check counsel. *It is unfortunate that the defendant suffers*"[2] (R. 190).

In addition, the court made inconsistent rulings favorable to the prosecution and prejudicial to the petitioner as follows:

(a) Prosecution witnesses could not be interrupted by objection, but must be allowed to finish answers (R. 14, 15, 21, 39, 42-47); but defense witnesses could be interrupted both by government counsel (R. 99, 113, 122, 124) and by the court (R. 114, 117, 129, 143).

[2] Emphasis added.

(b) The prosecution was permitted to show that petitioner had counsel present (R. 27), and to argue that if legal objections were to be made, counsel was to make them (R. 49, 165); but the defense was not allowed to show that the committee practice was not to permit counsel to speak (R. 107, 150), and that counsel had accordingly instructed petitioner to make his own legal objection (R. 146, 149, 150).[3]

(c) The defense counsel was not permitted to introduce evidence as to what the petitioner wished to say before the Committee (R. 133-135), but the prosecution was permitted to argue, over objection, its version of what the petitioner intended to say (R. 166-168).

(d) The defense was not allowed to show that petitioner would have answered questions if permitted to make a three minute objection (R. 121, 135), but the prosecution was permitted to show that the petitioner would not have answered questions (R. 140-147).

Further the trial court assumed the role of the prosecution and conducted a hostile cross-examination of the petitioner (R. 131, 132, 143, 145, 146), and refused in violation of Rule 30 of the Rules of Criminal Procedure to permit defense counsel to object to its charge out of the presence of the jury (R. 177).

At the trial, the prosecution presented no evidence to show the matter on which the petitioner had been summoned before the committee. The trial court, however, refused to grant petitioner's motion for a directed verdict of acquittal based on this failure of the prosecution to prove an essential element of the offense as defined by the statute, U. S. C., Title 2, § 192, and as charged in the indictment (R. 154). Moreover, the trial court refused to permit the petitioner

[3] It should be noted that the majority opinion of the appellate court considered it "important to note that appellant was accompanied to the hearing by his legal counsel" (R. 239). The majority opinion, however, did not comment on the inconsistent rulings of the trial court on this question, although the point was briefed and argued before the court below.

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to introduce evidence to show that he was not summoned on a matter committed to the committee by Congress (R. 101, 102, 104, 105, 119, 120). The court also excluded evidence to show that the petitioner wished only, in the three minutes he requested, to make a legal objection to his unlawful arrest before the committee and that having made such objection, he would willingly have taken the oath and testified (R. 119, 120, 126, 133-135, 138, 139, 146, 149, 150). The trial court, further, refused to instruct the jury that the petitioner had a right to make a legal objection before the committee, and could not be found guilty of contempt if he insisted on the exercise of that right and was otherwise willing to be sworn and testify freely (R. 180).

The defense contention was that Eisler had not refused to be sworn, but had merely tried to make a legal objection to the committee. This issue was clearly one of fact for the jury. The court, however, as we have shown, refused to submit this issue to the jury. Instead, it charged that the defendant had on several occasions "either refused categorically" to be sworn or "refused except on special conditions, that he specified" (R. 173). The court then charged, "The law is that a witness does not have the legal right to dictate the conditions on which he will or will not take the oath as a witness" (R. 173, 177). The court thus removed from the jury the only and key issue of fact by itself making a finding thereon adverse to the petitioner. It thus, in effect, directed a verdict of guilty.

The jury returned a verdict of guilty (R. 3). Motions for new trial and for arrest of judgment were argued and denied on June 27, 1947, and on the same date the court gave the maximum sentence—one year's imprisonment and a fine of $1,000 (R. 3, 212, 232). Notice of appeal was filed on June 27, 1947 (R. 2).

On June 14, 1948, the Court of Appeals for the District of Columbia affirmed the judgment below, with Justice Prettyman dissenting (R. 241-245). The grounds of the

dissent were (1) that the trial court should have disqualified itself on the filing of the affidavit of bias and prejudice; (2) that the trial court erred in refusing to permit the petitioner to testify that he wished only to make a legal objection before the committee; (3) that the prosecution failed to prove that petitioner was summoned to testify on a matter of inquiry submitted to the committee by Congress and (4) the general conduct of the trial. A petition for rehearing was thereafter filed and denied on July 17, 1948 (R. 247-252).

Statement as to Jurisdiction

The judgment of the Court of Appeals was entered on June 14, 1948 (R. 246). A petition for rehearing was denied on July 17, 1948 (R. 252). By order dated August 2, 1948, Chief Justice Vinson extended the time for filing this petition for certiorari to and including September 1, 1948 (R. 252).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, 28 U. S. C. § 347(a).

Statutes Involved

The following statutes are set out in the Appendix to this petition:

(a) Rev. Stats. § 102, U. S. Tit. 2 § 192.
(b) Sec. 21 of Judicial Code, Tit. 28 § 25.
(c) Sec. 121(b), Legislative Reorganization Act of 1946.
(d) Geneva Convention on Prisoners of War, Article 5.

Questions Presented

1. Did the trial court err by failing to disqualify itself upon the filing of the affidavit of bias and prejudice?

a. Was the affidavit of bias and prejudice, which alleged that the trial judge, prior to his elevation to the bench,

participated as a government official in an investigation of the petitioner out of which the present case arose, and had a personal hatred of Communists, a class which included the petitioner, substantively sufficient?

b. Was the affidavit of bias and prejudice, which was filed nine days after notice of assignment of the trial judge, but six days before the trial began, timely filed, where this lapse of time was due to the death of the brother of the chief trial counsel, and the need for conference and investigation.

2. Was the conduct of the trial court during the trial such as to deny the petitioner his constitutional rights to a fair trial under the Fifth Amendment, and to call for an exercise of this Court's power of supervision?

3. Was the court's charge to the jury, which, in essence, usurped the jury's function as a trier of facts, and directed a verdict of guilty, erroneous and a denial of the petitioner's right to trial by jury under the Sixth Amendment?

4. Did the trial court err in its refusal to direct a verdict of acquittal in view of the fact that the prosecution had failed to introduce any evidence to show that the petitioner was summoned on a matter of inquiry committed to the committee by Congress; was the conviction of the petitioner in the absence of any evidence that the committee was acting in aid of a legislative function a denial of the petitioner's constitutional rights under the Fifth, Ninth, and Tenth Amendments?

5. Did the trial court err in refusing to permit the petitioner to introduce evidence to show that he was not summoned on a matter of inquiry committed to the committee by Congress; did the refusal to permit petitioner to show that the Committee was acting beyond its authority and

not in aid of a legislative function deny the petitioner constitutional rights under the First, Fifth, Ninth, and Tenth Amendments?

6. Did the trial court err in refusing to permit the petitioner to introduce evidence to show he wished only to make a legal objection to the committee's procedure but was otherwise willing to be sworn and to testify; was it error for the trial court to refuse to instruct the jury that the petitioner had a right to make a legal objection before the committee, and could not be convicted of contempt if he insisted on that right, but was otherwise willing to be sworn and to testify; did such error constitute a denial of the petitioner's constitutional rights under the Fifth, Ninth and Tenth Amendments?

7. Was the petitioner required to testify before the Committee although he was illegally arrested at the Committee's instance and brought before the committee in custody; was the petitioner entitled to make a legal objection to such unlawful arrest prior to being required to testify; was the conduct of the committee in causing the petitioner's illegal arrest and refusing to permit him to make an objection to such arrest a denial of the petitioner's constitutional rights under the Fifth, Ninth and Tenth Amendments?

8. Were the petitioner's efforts to state, prior to being sworn and in accordance with the Committee's practice, a legal objection to the unlawful conduct of the Committee in causing his arrest, a wilful default within the meaning of U. S. C. Title 2, § 192?

9. Is a refusal to be sworn, qualified or otherwise, a default within the meaning of U. S. C. Title 2, § 192?

10. Did the court err in charging the jury that "willfully" as used in U. S. C. Title 2, § 192 required only that

the appellant had acted intentionally and deliberately, as contrasted with accidentally and inadvertently?

11. Was the petitioner, as an alien in transit detained in this country by governmental authorities against his will, required to testify before a Congressional committee?

12. Was the petitioner as an interned enemy alien entitled to the rights of a prisoner of war; as a prisoner of war could he be required under the Geneva Convention to testify before a Congressional committee?

13. Is the authority of the House Committee on Un-American Activities to compel testimony under the sanction of punishment for contempt, on its face and as applied generally and in the present case, unconstitutional as in contravention of the First, Fourth, Fifth, Ninth and Tenth Amendments and Article I, section 9 of the Constitution?

14. Is the statute establishing the House Committee on Un-American Activities, on its face and as construed and applied by the Committee, unconstitutional as in contravention of the First, Fourth, Fifth, Ninth and Tenth Amendments and Article I, section 9 of the Constitution?

Reasons for Granting the Writ

The writ should be granted because (1) the issues involved have not heretofore been determined by the Court; (2) they are of great public importance; (3) the decision below sanctioned by the trial court so far a departure from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision; (4) the decision below contravenes principles established by decisions of this Court. We will discuss these reasons for granting the writ in connection with each of the questions presented by this petition.

1. The Case as a Whole

The petitioner has been sentenced to serve a year in jail and pay a $1,000 fine because he tried to make a three-minute statement before the House Committee on Un-American Activities, which had procured his ignominious arrest, detention and public humiliation in order to punish him for his political views.[4]

This case thus represents a modern American version of the feudalistic offense of lèse majesté.

If the petitioner serves the sentence he will be no less a political prisoner because he had a trial. The trial, as we have shown, was one in which the petitioner was not allowed to make his defense, in which the prosecution was favored by the judge (who had refused to disqualify himself for bias), and in which the judge exhibited prejudice and hostility before a jury he virtually directed to convict.

Obviously, the petitioner's real "offense" is that he is a Communist, and the trial below stands for the proposition that a Communist is not entitled to a fair trial before being imprisoned. This is apparently the view of the House Committee on Un-American Activities and the Attorney General.[5]

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[4] That this was the Committee's purpose is clear from the record (R. 79, 80, 88, 90, 100-102, 124). We also invite the Court's attention to the statements made by a majority of the committee members on the House floor, in the course of debate on the resolution to cite the petitioner for contempt. See 93 Cong. Rec. 1177-1180 (Rep. Nixon), 1181-1182 (Rep. Rankin), 1182-1184 (Rep. Bonner), 1184-1186 (Rep. Mundt), 1186-1187 (Rep. Vail).

[5] Compare the following colloquy when the Attorney General appeared before the subcommittee on legislation of the Committee. Hearings before the Subcommittee on Legislation of the Committee on Un-American Activities, 80th Cong., 2d sess., on H.R. 4422 and H.R. 4581, February 5, 1948, p. 31 (emphasis added):

> MR. VAIL: • • •
>
> Mr. Clark, how would you feel about legislation preventing convicted aliens from being released on bail bond pending appeal of their convictions?

We submit that our constitutional tradition requires a different standard in the federal courts. See *Chambers* v. *Florida*, 309 U. S. 227, 241.

2. Issues Involving the Affidavit of Bias and Prejudice

This case presents to this Court the issue whether Sec. 21 of the Judicial Code, Tit. 28, § 25 [6] is to be applied in accordance with its purposes and intent, or whether it is to be nullified by judicial construction.

The majority below held that a trial judge who, as characterized by Justice Prettyman in his dissent (R. 242), "had

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MR. CLARK: Convicted aliens?

MR. VAIL: I am thinking, for example of the *Eisler* case.

MR. CLARK: I see. The alien that has been convicted?

MR. VAIL: Yes.

MR. CLARK: Should not be released on bail—well, sir, I think that that would go a little far. I think it depends upon the individual. You take Eisler, for example. I ordered him picked up the other day. What I pointed out in my statement here was that we have this problem of aliens that we have ordered deported that continued to carry on the same type of activities that we based the deportation upon, but we are unable to keep them in custody because the courts have held that we can't do that except during the period when we try to get the papers.

So the other day I ordered Mr. Eisler picked up for deportation because he had been making speeches over the country that were derogatory to our form of government and our way of life, and we had a case down here against him also, but I think that a blanket provision that would not permit bail would go mighty far in that direction. I think you largely have to leave it up to the courts.

MR. VAIL: I don't think we went too far in the *Eisler* case or that it would go too far in a case similar to the *Eisler* case.

MR. CLARK: That is a case in the courts, and I would rather not discuss it, sir.

MR. VAIL: Well, you are certainly to be complimented for the action taken in that case because I happen to know something about the activities of Eisler during the period he was out on bail bond, and it seems to me there should be something done to curb that.

MR. CLARK: I shall always and the Department of Justice shall always bear in mind foremost the civil rights of the people, whether they be citizens or not, *but we shall also bear in mind that the 140,000,000 Americans are entitled to protection from those who try to force upon them a foreign ideology.*

[6] Now Tit. 28 § 144.

been the active legal advisor to the investigator in the very investigation" which gave rise to the indictment of the petitioner might nevertheless sit in judgment upon that petitioner. In so holding, the majority refused to follow the ruling of the same court in *Barsky* v. *Holtzoff*, April Term 1947, Misc. 126, U. S. App. D. C., decided June 11, 1947, rehearing denied, June 12, 1947, in which the Court of Appeals for the District of Columbia held on a virtually identical affidavit of bias and prejudice, that Justice Holtzoff was required to disqualify himself. The majority, however did not see fit to mention or distinguish the *Barsky* case, although Justice Prettyman considered it to be controlling (R. 242). The decision below thus nullified the Congressional intent embodied in U. S. C. Title 28, § 25, which provides that upon the filing of an affidavit of bias and prejudice by a party to an action, the trial judge must disqualify himself. Although this Court has never passed upon a similar factual situation, the decision is in conflict with the doctrine of this Court established in *Berger* v. *United States*, 255 U. S. 22, 35, 36, that the statute's "solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial." The issue is of greatest public importance since it concerns the public confidence in our courts.

Many of our judges presently sitting in the federal district courts, have previously occupied positions with the federal government, a good many of them with the Department of Justice. Thus, the question as to whether a trial judge should, upon the filing of an affidavit of bias and prejudice, sit in judgment in cases or on individuals whose cases he dealt with while occupying a governmental position prior to his elevation to the bench[7] may frequently recur.

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[7] Cf. Section 5(e) of the Administrative Procedure Act, 5 U. S. C. § 1004(e).

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The majority below, with Justice Prettyman dissenting, held that the affidavit was not timely since it was filed nine days after notice of assignment of the trial judge, but nevertheless six days before the trial began, and although the lapse of time was caused by the death of the brother of the chief trial counsel and the need for conference and investigation. The statute literally requires the filing of the affidavit "not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time." (This same provision is carried over into the new Judicial Code 28 U. S. C. Sec. 144.) Both the majority and minority below agreed that this portion of the statute cannot be applied to a jurisdiction such as the District Court for the District of Columbia where the court is in continuous session and where a number of judges sit in rotation and the identity of the trial judge is not known until shortly before trial. This Court has never determined the nature of the time requirement, if any, within which affidavits must be filed in such jurisdictions. The question is of great public importance since most of the District Courts in populous areas function in the same fashion.

The decision below is illustrative of a tendency in the lower courts to apply the statute narrowly and technically, thus nullifying the intent of the statute and the doctrine of the *Berger* case, *supra*. See *Frank, Disqualification of Judges*, 51 Yale L. J. 605, 629. This Court must determine whether this important statute, enacted to preserve confidence in the courts and to protect litigants from possibly biased judges, is to receive a fair and liberal interpretation or a negative, narrow and grudging one. The majority below apparently conceived that affidavits of this character must be filed almost instantaneously (R. 236), ignoring the important considerations stressed by Justice Prettyman in his dissent that such affidavits "should be prepared with the utmost care and certainty as to the facts" and that the

"courts should encourage careful consideration and deliberation on the part of counsel" (R. 243). This conception of the majority below is inconsistent with the conception of the Eighth Circuit Court of Appeals in *Morris* v. *United States*, 26 F. (2d) 444.

In his dissent, Justice Prettyman also indicated that since there were twelve active judges in the District Court for the District of Columbia, "other judges were available so that the trial would not have been delayed" (R. 243).[8]

3. Issues Involving the Conduct of the Trial

We have summarized briefly above the conduct of the trial court during the course of the trial, giving record citations. A trial judge should be held to a high and unyielding standard in the execution of his oath of office. The first of the Canons of Judicial Ethics of the American Bar Association calls on the judge to be courteous to counsel. The fifth canon requires that he be "temperate, attentive, patient, impartial." So important to the judiciary is the preservation of public confidence and respect that the judge must not only *be* impartial, he must *appear* impartial as well. *Whitaker* v. *McLean*, 73 App. D. C. 259, 118 F. (2d) 596; *Egan* v. *United States*, 52 App. D. C. 384, 397, 287 Fed. 958, 971. Nor may a trial court participate excessively in examining defense witnesses, particularly in cross-examination of a defendant. *Adler* v. *United States*, 182 Fed. 464; *Martuci* v. *Brooklyn Children's Aid Society*, 140 F. (2d) 732; *Williams* v. *United States*, 93 F. (2d) 685.

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[8] In the *Berger* case, *supra*, the Supreme Court, in answering the argument that to permit disqualification of judges upon the mere filing of affidavits would lead to abuses, said at p. 35:

> And in this there is no serious detriment to the administration of justice, nor inconvenience worthy of mention; for of what concern is it to a judge to preside in a particular case? Of what concern to other parties to have him so preside?

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The record here is convincing that the trial court exhibited an active bias, hostility and prejudice toward the petitioner throughout the trial and in the sentencing. The trial judge was, when measured by the canon's requirements, discourteous to counsel, intemperate, impatient, partial. He was not impartial and did not appear to be impartial. He discriminated in his treatment of the defense and the prosecution. He applied restrictive rules to the defense alone. He exacted retribution for fancied slights, as in refusing to entertain offers of proof (R. 109, 110). Under the guise of expediting the trial, he prolonged it by unnecessary harassing of counsel and petty bickering. He rebuked and ridiculed defense counsel without cause. He minimized defense evidence. His inconsistencies in ruling on admissibility of evidence were adverse to the defense. In his raising of objections and in his cross-examination of the petitioner he came close to conducting the prosecution. Worst of all, this misconduct seems to have been, to some extent at least, intended. The record shows that the trial judge realized the effect his rebukes would have on the jury; he threatened defense counsel to that effect (R. 51), and, after carrying out his threat, justified his action on the ground that a defendant must suffer for his attorney's supposed lack of urbanity (R. 190).

The trial court justified some of its actions on the basis that defense counsel was provocative. But the court itself conceded that the record reveals no such conduct by counsel (R. 190, 191). But even were such the case, it would not remedy the error, since provocative conduct by counsel cannot justify prejudicial conduct by the Court. *Lambert* v. *United States*, 101 F. (2d) 960; *Commonwealth* v. *Stallone*, 281 Pa. 41, 126 Atl. 56.

Finally, in its charge to the jury, the Court removed from the jury the only issue of fact before it, instructed the jury that the petitioner had refused to be sworn, except on a

condition which he had no right to make, and thus virtually directed a verdict of guilty. Under the doctrine of this Court, such an instruction deprived the petitioner of his constitutional right to a trial by jury, *Starr* v. *United States*, 153 U. S. 614, 624-626. See also *Rudd* v. *United States*, 173 F. 912, 914.

In addition, the hostile conduct of the trial court deprived the petitioner of a fair trial and denied him the due process guaranteed by the Fifth Amendment.

Further, the trial court in its conduct so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. This supervision is especially called for in this case. The petitioner is an alien Communist caught in the "near-hysteria" engendered against Communists in this country. See Report of the President's Committee on Civil Rights, *To Secure These Rights*, p. 49. The trial judge, having stricken the affidavit of bias and prejudice, was under a moral responsibility to preserve the prestige of the judiciary by exercising the greatest possible caution to avoid any appearance of judicial bias. His conduct, however, fully bore out the apprehensions voiced in the affidavit.

Under these circumstances, it is especially important for this Court to vindicate the American tradition of equal justice before law, and of due process to citizen or alien, "of whatever race, creed or persuasion." See *Chambers* v. *Florida*, 309 U. S. 227, 241.

4. Issues of Judicial Review in Contempt Proceedings under 2 U.S.C. sec. 192

The indictment in this case alleged that Eisler was summoned to testify "upon matters of inquiry committed to" the Committee on Un-American Activities (R. 215). This was an essential allegation under the statute, and had to be pleaded and proved by the prosecution. *Sinclair* v.

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United States, 279 U. S. 263, 296, 297. Yet, as we have seen, no evidence of any kind was introduced at the trial on this point. Hence, as Justice Prettyman held in his dissent (R. 244-5), the trial court erred in its denial of the motion for judgment of acquittal. The majority opinion below does not discuss this point, although it was briefed and argued.

Furthermore, as we have seen, the trial court refused to allow introduction of evidence offered to prove that the petitioner had been summoned by the Committee not to testify on matters committed to it but for harassing, illegal, non-legislative purposes.

The trial court and the court below by affirming, have thus overruled the long-established doctrine of this Court that Congressional committees may compel attendance of witnesses and testimony only in inquiries within Congress' limited powers. *Kilbourn* v. *Thompson*, 103 U. S. 168; *In re Chapman*, 166 U. S. 61; *McGrain* v. *Daugherty*, 273 U. S. 135; *Jurney* v. *MacCracken*, 294 U. S. 125.

If the decision below stands, what then has become of Justice Brandeis' assurance that "assertions of Congressional privilege are subject to judicial review?" *Jurney* v. *MacCracken*, *supra*, at 150. And see 26 Cong. Globe 439, 440, 34th Cong., 3d Sess., remarks of Senator Bayard, for Congress' own realization of the need for judicial review to protect individuals from unwarranted legislative inquisition. Cf. 8 Wigmore, Evidence (3d ed.) § 2195, p. 80. And it is clear that the contempt statute may not be constitutionally applied where, as in the present case, the inquiry involved was not within Congress' powers. *In re Chapman*, 166 U. S. 661; *Sinclair* v. *United States*, *supra*; *Jurney* v. *MacCracken*, *supra*.

To deny the right of judicial review to one brought into court on a charge of contempt under Tit. 2, § 192, is to repudiate our constitutional form of government. Certainly

there is no reason for the doctrine that actions of Congressional committees are not subject to check in accordance with the Constitution and statutes to the same extent as are actions by officials of the executive department or the judiciary. It is necessary therefore that this Court review and reverse the dangerous doctrines established by the decisions below that when legislative committees invoke the sanctions of Tit. 2, § 192, the courts are precluded, in such prosecutions, from determining whether the witness sought to be punished was called before the committee on a matter within the jurisdiction of Congress and the committee.

5. Issues Involving Procedure before Congressional Committees, and the Interpretation of Title 2, § 192

(a) The trial court excluded evidence offered to show that the petitioner wished only to make a legal objection to his unlawful arrest by the committee, and was otherwise willing to be sworn and to testify. The Court also refused, although requested, to instruct the jury that if the petitioner wished only to make a legal objection to the committee's procedure, and was otherwise willing to be sworn and to testify, he should be acquitted. For the purposes of this appeal, it is therefore established that the petitioner wished only to make a legal objection to the committee's procedure, and was otherwise willing to be sworn and to testify. That a witness has the right to state an objection to the procedure or the questions of a Congressional committee either directly or through counsel is elementary due process, see *Townsend* v. *United States*, 95 F. (2d) 352, 361. The Chairman of the Committee, himself, testified that this is established procedure before the Committee (R. 49; See majority opinion at 238). The petitioner therefore was certainly not guilty of a wilful default within the meaning of Tit. 2, § 192, however "wilfully" may be defined, if

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he wished only to object to the committee's procedure in conformity with the practice recognized by the Committee as proper.

Justice Prettyman's dissent considered these actions of the trial court to be reversible error (R. 243-4). The majority below, however, misconceived the issue. The issue was whether the jury should have been allowed to pass on the factual question as to whether or not the petitioner merely wished to make a legal objection; if so, obviously evidence on the subject should have been allowed and the jury should have been appropriately instructed. The majority, however, instead of deciding what was relevant for the jury, itself found as a fact that the petitioner had not wished to make a legal objection (R. 238). Thus both the majority below and the trial court committed error by finding a disputed fact in a criminal prosecution, thus usurping the constitutional function of the jury.

(b) The trial court and the court below rejected the petitioner's contention that a refusal to be sworn is not a default within the meaning of Tit. 2, § 192. But the petitioner's contention is supported by the legislative history of the statute, dictionary, commentators' and judicial construction of the word "default." 34 Cong. Globe 405, 406; 3 Oxford Eng. Dict. (1933) 126, quoting the 1828 Webster; Black's Law Dict. (3rd ed. 1933) 539; 3 Coke on Littleton, c. 7 sec. 438; cf. 3 Bl. Comm. 396; *Page* v. *Sutton, Orlop & Co.*, 29 Ark. 304, 306; *Covart* v. *Haskins*, 39 Kan. 571, 574, 18 Pac. 522. These authorities indicate that the word "default" refers to a failure or omission to plead, appear, or attend, cf. *Townsend* v. *United States*, 95 F. (2d) 352, and does not include a refusal to be sworn. In view of the settled necessity of giving a strict construction to a penal statute, the coverage of the statute should not be extended beyond the words used.

(c) The trial court charged the jury that the word "willfully" as used in Tit. 2, § 192 required only that the petitioner had acted intentionally and deliberately, as contrasted with accidentally and inadvertently (R. 172). In accordance with this interpretation, the trial court excluded evidence relative to the petitioner's good faith and lack of bad purpose (R. 118, 122, 126, 127, 133-135, 138, 139, 146, 149, 150). But this statutory construction is in conflict with the decisions of this Court in *United States* v. *Murdock*, 290 U. S. 289; *Hartzell* v. *United States*, 322 U. S. 680; *Screws* v. *United States*, 325 U. S. 91, as well as with the legislative background of the statute. (See 34 Cong. Globe 405, 406, 34th Cong. 3rd Sess., remarks by Representative Orr.)

(d) The trial court and the majority below rejected the petitioner's contention that having been unlawfully arrested and unlawfully brought before the committee against his will he could not be guilty of a violation of Tit. 2, § 192. But the subpoena powers granted to the House Committee do not comprehend the power to order the arrest of prospective witnesses and their forcible appearance before the committee. A witness, such as the petitioner, who is unlawfully arrested and brought before the committee in custody is certainly not "summoned as a witness" within the meaning of Tit. 2, § 192, and, while illegally arrested, cannot be guilty of a wilful default. And as pointed out above, his mere attempt to object to such unlawful arrest should not in any event be considered a wilful default within the meaning of the statute.

(e) All of these issues involving the correct interpretation of Tit. 2 § 192 are questions of first impression before this Court. They are questions of great public importance. With the growing use of Congressional investigating committees, it is imperative that this Court speak authoritatively on the rights of witnesses before such committees and

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the extent to which the ordinary elements of due process apply. If Congressional committees are exempt from all procedural requirements, may summarily arrest prospective witnesses, and may arbitrarily deny to witnesses the right to counsel or the right to state legal objections, and still subject witnesses who are denied these rights to the penalties of Tit. 2, § 192, it is for this Court to say so. In addition, since Tit. 2 § 192 is the statute employed to coerce testimony before Congressional committees, such statute should be authoritatively interpreted by this Court. The increasing use of this statute, and the great bulk of litigation which is arising under it demands an early and authoritative interpretation by this Court.

6. Issues Involving Questions of International Law

(a) The petitioner contended that, as an alien in transit detained in this country against his will, he was not required to appear and testify before a Congressional committee. The trial court, in rejecting this contention, excluded evidence that the petitioner was an alien in transit detained in this country by governmental authorities against his will. The facts must therefore be considered as established in this record on appeal. The House Committee has authority to summon witnesses and compel testimony only in aid of the formulation of legislation. *Kilbourn* v. *Thompson*, 103 U. S. 168; *McGrain* v. *Daugherty*, 273 U. S. 135; *In re Chapman*, 166 U. S. 661; *Jurney* v. *McCracken*, 294 U. S. 125. The duty to obey such summons is an attribute of allegiance, not of the police power. As an alien in transit, detained in this country against his will, owing full allegiance to another state and only "a local and temporary allegiance" to the United States (*Carlisle* v. *United States*, 16 Wall. 147, 154; *The Schooner Exchange* v. *M'Fadden*, 7 Cranch 116, 144; *United States* v. *Wong Kim Ark*, 169

U. S. 649, 693), the petitioner had no such nexus with our legislature as to require him to cooperate with its efforts to formulate legislation.

This issue is one of first impression before this Court and also one of great significance in international law. Surely, if a Congressional committee can detain an alien who touches at a port in this country en route to another, and compel his testimony before a Congressional committee, such conduct would sanction similar action by other countries toward American citizens.

Suppose an American citizen en route to France, touched at an English port. Surely the House of Commons could not, without violating international law, detain him and compel him to testify against his will in order to assist Parliament to determine British foreign or domestic policy. Such a procedure would quite properly arouse indignation in this country, and representations would most certainly be made by our State Department of violations of international law.

The majority opinion below chose to ignore this question, and instead discussed the easier question of the authority of the House Committee over a resident alien (R. 238), an issue not presented by the facts and not argued or briefed below.

(b) It was stipulated at the trial that the petitioner had been arrested and was in custody as an enemy alien at the time he appeared before the Committee (R. 80, 81). The trial court and the majority below, however, rejected the petitioner's contention that such status as an interned enemy alien gave him immunity from questioning by the House Committee. An interned enemy alien is entitled to all the rights of a prisoner of war. Basic Field Manual FM27-10, Rules of Land Warfare at p. 16; Law of Land Warfare prepared at Judge Advocate General's School at p. 47; United States Department of State Bulletin; vol.

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VI, No. 152, p. 445, 446, May 23, 1942. By the terms of the Geneva Convention, the petitioner as a prisoner of war could not be required to testify before the Committee. Geneva Convention on Prisoners of War, Article 5; Law of Land Warfare at p. 58; Spaight, "Air Power and War Rights" 340; 2 Oppenheim, International Law (6th edition, Lauterpacht) § 126a, p. 294.

This question is one of first impression before this Court and involves an important principle of international law.

7. Issues Involving the Constitutionality of the Committee's Authority to Summon Witnesses and to Compel Testimony.

This case also presents to this Court constitutional issues arising from the face of the statute establishing the House Committee and the manner in which the House Committee has construed and applied the authority given to it. This statute as construed and applied, and the authority of the House Committee to compel testimony under the sanction of punishment for contempt, are unconstitutional as in contravention of the First, Fourth, Fifth, Ninth and Tenth Amendments and Article I, Section 9 of the Constitution.

These constitutional issues, which are distinct from those previously discussed in this petition, have been twice presented to this Court, which denied certiorari in both cases, *Josephson* v. *United States*, 333 U. S. 838, rehearing den., 333 U. S. 858, *Barsky* v. *United States*, 334 U. S. 843. A petition for rehearing in this latter case is still pending before this Court. Accordingly, we will not here discuss the manner in which the judgment of the Court below on these issues is in conflict with applicable decisions of this Court.

We are unaware of the considerations which have led the Court to deny certiorari in those cases although it is

clear that the denial imported "no expression of opinion upon the merits of the case." *United States* v. *Carver*, 260 U. S. 482, 490.

Nevertheless, this issue of the authority of the Committee requires the consideration of this Court. The decision below in this case, as in the others[9] has decided important questions of constitutional law which have not been, but should be settled by this Court. Approximately fifteen cases in which these issues are involved are now pending in the lower courts, and others will undoubtedly arise in the near future. The subsequent activities of this Committee since this Court's denial of petitions for certiorari have emphasized the extreme public importance of the Committee's role in American life, and the necessity for review of the Committee's authority by this Court. Indeed, the activities of the Committee since this issue was last before the Court, have received the condemnation of the President of the United States as a violation of the Bill of Rights. See Washington Star for August 19, 1948, p. 1, col. 2. And certainly the conduct of the Committee in the present case emphasizes the importance and necessity of review by this Court.

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[9] *Josephson* v. *United States*, 165 F. (2d) 82; *Barsky* v. *United States*, 167 F. (2d) 241.

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APPENDIX A

Statutes Involved

(a) Rev. Stats. § 102, as amended by c. 594, Act of June 22, 1938, 52 Stat. 942, U. S. C. Title 2, § 192:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

(b) Sec. 21 of Judicial Code, Act of March 3, 1911, c. 231, § 21, 36 Stat. 1090, U. S. C. Title 28, § 25:

> Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in section 24 of this title, or chosen in the manner prescribed in section 27 of this title, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good

faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action.

(c) Sec. 121 (b), Legislative Reorganization Act of 1946, P. L. 601, c. 753, 79th Cong., 2d Sess., 60 Stat. 828, amends Rule XI (1)(q)(2) of the Rules of the House of Representatives to provide:

> The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.
>
> The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.
>
> For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.

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(d) Article 5 of the Geneva Convention:

Every prisoner of war is bound to give, if he is questioned on the subject, his true name and rank, or else his regimental number.

If he infringes this rule, he is liable to have the advantages given to prisoners of his rank curtailed.

No coercion may be used on prisoners to secure information relative to the condition of their army or country. Prisoners who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind whatever.

If, because of his physical or mental condition, a prisoner is unable to identify himself, he shall be turned over to the medical corps.

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No. 255

Supreme Court of the United States

October Term, 1948

GERHART EISLER, *Petitioner,*

vs.

THE UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITIONER'S REPLY TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

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PETITIONER'S REPLY TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

The opposition of the United States to the petitioner's request for a writ of certiorari ignores many of the questions raised by the petition, and misstates and distorts others. In order to clarify the issues before the Court, we believe it necessary to reply to the government's opposition.

1. The Affidavit of Bias and Prejudice.

The attempt of the government to strip the affidavit of bias and prejudice of certain of its pertinent allegations is obviously strained and artificial. The portions of the affidavit referred to by the government (Opp. 12) are not

argument or innuendo; they are stated as beliefs on the part of the petitioner. (R. 223-224). An affidavit of bias and prejudice need not rest on personal knowledge alone but may be based upon information and belief. *Berger v. United States*, 255 U. S. 22, 34. Further, it is of significance that the construction of the affidavit now offered by the government was not considered by either the trial judge or the court below. The trial judge took issue with the facts alleged, ruling that the judge against whom an affidavit of bias and prejudice is filed may file an answer and contest the facts (R. 207-208). Both the majority and minority below took the same view of the affidavit as did the petitioner (R. 237, 242). And indeed the paraphrase objected to by the government (Opp. 12) was substantially the same as that made by Judge Prettyman (R. 242). Clearly, the affidavit should be read fairly as a whole, and not distorted for the purpose of negating its clear import. Significantly, also, the government fails to mention or attempt to distinguish the case of *Barsky v. Holtzoff*, April Term, 1947, Misc. 126, U. S. App. D. C., decided June 11, 1947, a case considered by both the petitioner and Judge Prettyman to be controlling, although ignored by the majority below (Pet. 16).

Even under the government's version, the character of the bias and prejudice alleged in the affidavit was similar to that asserted with regard to the trial judge in the *Berger* case, *supra*, and considered sufficient by this Court. The affidavit, here, did not assert a preconception on issues on the part of the trial judge, but a personal bias and prejudice by the trial judge against the petitioner and others like him (R. 225). The basis of the affidavit was not that the trial judge had preconceptions on the issue of communism, but that he had a personal bias and prejudice against the petitioner and other alien communists, and would not give them a fair trial regardless of the issue involved.

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The government's opposition concedes that the question of timeliness, here, is solely one of due diligence. (Opp. 16). It follows this with the unsupported assertion that a lapse of nine days between knowledge of the assignment of the trial judge and the filing of the affidavit under the circumstances here involved (i. e. the death of the brother of chief trial counsel, and the need for conference and investigation) did not constitute such due diligence (Opp. 17). The affidavit, it should be noted, was filed six days before commencement of trial (R. 231), and would not have delayed the trial (R. 243). Obviously, this whole question of due diligence under the statute is an extremely important one and requires clarification and decision by this Court.

2. The Conduct of the Trial.

The government's opposition makes the bald assertion that the record does not support the petitioner's contention that the conduct of the trial judge deprived him of a fair trial (Opp. 17). It is impossible in the short space of a petition for certiorari to detail the numerous instances in which the actions of the trial judge transgressed the standards of impartial conduct. We refer the Court again to the record references in the petition (Pet. 6-8, 19), as well as the trial judge's own admissions (R. 51, 190, 191).

In the course of its argument, the government states the obvious that: "Impartiality does not demand that the rulings in favor of one side shall be arithmetically equal to rulings for the other" (Opp. 17-18). But no such contention was made either to the court below or in the petition. Intrusion of this false issue by the government can serve only to divert this Court from the real questions presented.

Significantly enough, although the government does devote space to the destruction of a straw man set up by itself, it ignores completely the specific contentions raised by the petition such as the trial judge's violation of Rule

30 of the Rules of Criminal Procedure (Pet. 8), his inconsistent rulings favoring the prosecution (Pet. 7-8), and his charge to the jury which was equivalent to a direction of a verdict of guilty, thereby denying to petitioner the right to trial by jury (Pet. 9, 19-20). See *Starr v. United States,* 153 U. S. 614, 624-626; *Weiler v. United States,* 323 U. S. 606, 611; *Bollenbach v. United States,* 326 U. S. 607, 614.

3. Judicial Review of Congressional Action.

The government answers the petitioner's contention that the prosecution failed to prove an essential allegation of the indictment; i. e., that petitioner was summoned to testify "upon matters of inquiry committed to" the Commitee (R. 215), by making reference to the enabling resolution and the subpoena served on the petitioner (Opp. 20). But these documents show only the authority given the Committee by Congress. They do not constitute evidence that the Committee was acting within the confines of that authority, or that the petitioner was actually summoned to testify upon a matter within that authority.

Under the doctrine of *Sinclair v. United States,* 279 U. S. 263, 296, 297, the government was required to introduce evidence as to the subject on which petitioner was summoned to testify and to show its pertinence to the matter under inquiry before the Committee. No such evidence was presented. The government cites *McGrain v. Daugherty,* 273 U. S. 135, and *Josephson v. United States,* 165 F. (2d) 86, as contrary authority. But in both cases the persons charged with contempt explicitly stated that they would not answer pertinent questions.

No such situation is presented here. The petitioner never asserted that he would not answer pertinent questions. He was not charged, as were the others, with a refusal to answer questions, but with a wilful default. The indictment expressly alleges that petitioner was sum-

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moned to testify "upon matters of inquiry committed to" the Committee (R. 215). This was clearly a necessary allegation, in view of the statutory text, and is recited in addition to the allegation of the refusal to be sworn. Hence both allegations had to be proved, and proof of one does not eliminate the need to prove the other. Obviously there is no doctrine of law that if one allegation is proven against a defendant, the defendant may not therefore challenge the failure to prove another necessary allegation of the indictment. Yet this, in essence, is the contention presented by the government.

The government further answers the contention that the petitioner was denied an opportunity to prove that he was not summoned to testify on matters committed to the Committee by Congress, by the assertion that the motives of the Committee "are not matters for judicial cognizance," relying again on the *Josephson* case, *supra* (Opp. 21). But that case involved only a general attack on the Committee's validity, see 165 F. (2d) at 89. It did not involve, as does the present case, an offer to prove that the Committee was not, as regards the petitioner, acting within the authority committed to it by Congress.

Certainly such a defense must be open to anyone charged with contempt of a congressional committee under Title 2, §192. The logic of the government's position is that in such a prosecution the prosecution need not prove that the committee is acting within the authority committed to it by Congress, and the defendant may not offer evidence to show that the committee is not, in his own individual case, acting within the limits of that authority. If the *Josephson* case stands for any such proposition, which it does not, then it overrules a long line of authority to the effect that Congressional committees may compel attendance of witnesses and testimony only in inquiries within Congress' limited powers. *Kilbourn v. Thompson*, 103 U. S. 168; *In*

re Chapman, 166 U. S. 61; *McGrain v. Daugherty*, 273 U. S. 135; *Jurney v. MacCracken*, 294 U. S. 125. The essence of the government's position is that there is an irrebuttable presumption that Congressional committees are acting within the limits of their own and Congress' authority. To uphold such a contention would be to hold that Congressional committees, are under no circumstances, subject to judicial review. Clearly that is not the law as stated by this Court.

4. Petitioner's Efforts to Make a Legal Objection to the Illegal Conduct of the Committee.

The government baldly asserts that a Congressional committee may adopt any procedure it wishes and such procedure will not be subject to judicial review (Opp. 22-24). Thus, according to the government, in the present case, although the petitioner was illegally arrested at the instance of the Committee and brought before the Committee in custody, his insistence on making a legal objection to this illegal conduct of the Committee prior to being sworn, constituted contempt. The government, however, can cite no authority for this extreme proposition since none exists. In any event, this is a novel question before this Court; no such extreme conduct on the part of a Congressional committee has ever been presented before this Court, and it is certainly a question that calls for full consideration and decision by this Court.

The government concedes that the efforts of the petitioner to make a legal objection does go to the question of wilfulness (Opp. 22). This is buttressed by the fact, not alluded to by the government, that it was the established procedure, as testified to by the Chairman of the Committee, to permit such legal objection prior to being sworn (R. 49, majority opinion at R. 238, dissenting opinion at R. 245). The government, nevertheless, justifies the refusal of the trial judge to permit petitioner to testify

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as to what he intended to say, on the ground that this testimony "would have served merely to confuse the issue before the jury. . . ." (Opp. 21). It is difficult to understand how admittedly relevant testimony could confuse the issue before the jury, unless one is to assume, as apparently the trial judge did, that the issue of petitioner's guilt or innocence was for the judge and not the jury. Further, that the government's real objection to this evidence is that it would have been favorable to the defense, is clear from the argument of the government, that the jury could have found from other evidence that the petitioner did not in fact wish to make a legal objection, but wished instead to read a 20 page statement in which he would have indicated his refusal to answer questions (Opp. 25). The petitioner alleged, as one of its grounds of error, this inconsistent ruling of the trial court denying the petitioner the opportunity to testify as to what he intended to say, and that he did intend to answer questions, while permitting the prosecution to introduce evidence and argue to the contrary (Pet. 8). And now, the government, while refusing to address itself to this error, uses this very error to support the verdict below. Certainly, the inference of the jury referred to by the government (Opp. 25), might well have been different, if petitioner had been permitted to testify as to what he intended to say, and that he, thereafter, would willingly have answered questions. As stated by Judge Prettyman in his dissent: "If it was the established practice that legal objections be stated by the witness before he was sworn, and if appellant could prove that all he wanted to do was to state his legal objections and thereafter be sworn and 'answer all questions', I do not see how he could be held guilty of 'wilful' default" (R. 245).

Clearly, the petitioner was entitled to present such evidence, and was entitled to such requested instructions to the jury (See Requested Instructions 28 and 29, R. 181). The trial judge's denial of this opportunity and of these instructions is obviously error.

CONCLUSION

We have not considered it necessary to reply to all of the contentions presented by the government. We believe sufficient has been shown both in the petition and in this reply to indicate that the questions presented by the petition, as well as the contentions raised in opposition by the government, present issues which have not heretofore been determined by the Court, and are of great public importance, and that the decision below contravenes principles established by this Court.

Respectfully submitted,

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No. 255

IN THE

Supreme Court of the United States

October Term, 1948

GERHART EISLER, *Petitioner,*

v.

THE UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER

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In The

Supreme Court of the United States

October Term, 1948

No. 255

Gerhart Eisler, *Petitioner*

v.

The United States of America

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia is reported in 170 F. (2d) 273. The opinion of the trial court has not been reported.

JURISDICTION

The jurisdiction of this Court rests upon 28 U. S. Code sec. 1254. The petition for a writ of certiorari was granted on November 8, 1948 (R. 253).

STATUTES INVOLVED

The following statutes are set out in the Appendix to this brief:

(a) Rev. Stats. sec. 102, as amended by Act of June 22, 1938, 2 U. S. C. sec. 192.

(b) Act of March 3, 1911, c. 231, sec. 21, formerly section 21 of Judicial Code.

(c) Sec. 121(b), Legislative Reorganization Act of 1946.

(d) Geneva Convention on Prisoners of War, Article 5.

STATEMENT OF THE CASE

This case presents for review a judgment affirming the conviction of the petitioner for violation of Rev. Stats. sec. 102, as amended, 2 U. S. C. sec. 192, quoted in Appendix.

Gerhart Eisler, the petitioner herein, is an Austrian national (R. 117), a member of the German Communist movement (R. 222), who came to the United States in June, 1941 as a political refugee en route to Mexico under a transit visa (R. 113, 114). At the trial, the court excluded evidence proffered to prove that Eisler was detained in this country against his will by the government's cancellation of his transit visa and its refusal to grant his numerous requests for permission to leave the country (R. 95-98, 115 118, 62, 63, and see R. 219, 220).

On January 24, 1947, the House Committee on Un-American Activities served a subpoena requiring Eisler to appear before the Committee in Washington on February 6, 1947 (R. 13, 22, 23). Thereafter, Eisler prepared for his forthcoming appearance by conferring with counsel, preparing a statement, buying railroad tickets to Washington for himself and his wife, and making Washington hotel reservations (R. 122, 110, 111).

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On February 4, 1947, two days before his scheduled appearance, Eisler was arrested in New York as an "enemy alien" by two security officers of the Immigration and Naturalization Service of the Department of Justice (R. 80, 81, 82, 123). Eisler was taken by the arresting officers to Ellis Island (R. 124), and on the next day (February 5) was taken, still in the custody of the Immigration officers, to Washington, D. C. There he was confined in the District jail overnight (R. 83, 125). On February 6, 1947, he was taken in the same custody, to the hearing room of the Committee on Un-American Activities (R. 13, 30, 85). During the hearing he was still in custody (R. 81).

At the trial, the court excluded evidence proffered to prove that Eisler's arrest was illegal, in that (a) Eisler was, as the Department of Justice knew, an Austrian national and hence not an enemy alien, (b) the arresting officers neither had nor exhibited a warrant of arrest, and (c) the government had earlier discontinued the arrest and internment of enemy aliens (R. 80, 82, 87-92, 97, 98, 102, 108, 109, 124, 63-66.) The court also excluded evidence offered to prove that this illegal arrest was instigated by the Un-American Activities Committee of the House of Representatives for the purpose of having him brought before the Committee and to punish him for his political beliefs and to prevent his departure from the United States and his return to Germany (R. 68-71, 79, 80, 88-90, 100-102, 104, 105, 119-120, 213).

At the hearing before the Commitee, the following occurred (read into the record from a transcript of the hearing (R. 43-47):

> The Chairman.[1] Now, Mr. Stripling, call your first witness.
>
> Mr. Stripling: Mr. Gerhart Eisler, take the stand.
>
> Mr. Eisler: I am not going to take the stand.

[1] The Chairman of the hearing was Representative J. Parnell Thomas (R. 13, 14). Mr. Stripling was the Committee's Chief Investigator (R. 26). Mr. Mundt and Mr. Rankin were members of the Committee.

Mr. Stripling: Do you have counsel with you?

Mr. Eisler: Yes.

Mr. Stripling: I suggest that the witness be permitted counsel.

The Chairman: Mr. Eisler, will you raise your right hand?

Mr. Eisler: No. Before I take the oath——

Mr. Stripling: Mr. Chairman——

Mr. Eisler: I have the floor now.

Mr. Stripling: I think, Mr. Chairman, you should make your preliminary remarks at this time, before Mr. Eisler makes any statement.

The Chairman: Sit down, Mr. Eisler.

Now, Mr. Eisler, you will be sworn in. Raise your right hand.

Mr. Eisler: No.

The Chairman: Mr. Eisler, in the first place, you want to remember that you are a guest of this Nation.

Mr. Eisler: I am not treated as a guest.

The Chairman: This committee——

Mr. Eisler: I am a political prisoner in the United States.

The Chairman: Just a minute. Will you please be sworn in?

Mr. Eisler: You will not swear me in before you hear a few remarks.

The Chairman: No; there will be no remarks.

Mr. Eisler: Then there will be no hearing with me.

The Chairman: You refuse to be sworn in? Do you refuse to be sworn in, Mr. Eisler?

Mr. Eisler: I am ready to answer all questions, to tell my side.

The Chairman: That is not the question. Do you refuse to be sworn in? All right.

Mr. Eisler: I am ready to answer all questions.

The Chairman: Mr. Stripling, call the next witness. The committee will come to order, please. What is the pleasure of the commitee?

Mr. Stripling: Mr. Chairman, I think that the witness should be silent, or take the stand or be removed from the room, one or the other, until this matter is determined.

Mr. Mundt: Mr. Chairman, suppose you ask him again whether he refuses to be sworn.

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Mr. Rankin: Not 'sworn in' but to be sworn.

The Chairman: Mr. Eisler, do you refuse, again, to be sworn?

Mr. Eisler: I have never refused to be sworn in. I came here as a political prisoner. I want to make a few remarks, only 3 minutes, before I be sworn in, and answer your questions, and make my statement. It is 3 minutes.

The Chairman: I said that I would permit you to make your statement when the committee was through asking questions. After the committee is through asking questions, and your remarks are pertinent to the investigation, why, it will be agreeable to the committee. But first you have to be sworn.

Mr. Eisler: That is where you are mistaken. I have to do nothing. A political prisoner has to do nothing.

The Chairman: Then you refuse to be sworn?

Mr. Eisler: I do not refuse to be sworn. I want only 3 minutes. Three minutes to make a statement.

The Chairman: We will give you those 3 minutes when you are sworn.

Mr. Eisler: I want to speak before I am sworn.

Thus, it is clear that, although the petitioner wished to make a three-minute statement before being sworn, he was ready and willing to be sworn and to testify.

The Committee then voted to cite Eisler for contempt (R. 52, 53).

On February 27, 1947, an indictment was filed charging that Eisler failed and refused to be sworn to testify before the Committee, "and thereby on February 6, 1947, within the District of Columbia, willfully did make default" (R. 214, 215). Eisler was arraigned before Chief Justice Laws on April 22 (R. 215, 230). Immediately prior to the arraignment, Carol King, of the New York bar, was admitted by Chief Justice Laws to the bar of the Court *pro hac vice*, and entered her appearance as counsel of record for the petitioner (R. 229, 230).

On May 23, 1947, the motion to dismiss the indictment was argued before and denied by Justice Holtzoff (R. 4,

221). On May 29, Eisler filed an affidavit alleging bias and prejudice on the part of Justice Holtzoff (R. 222-226). The affidavit was accompanied by a certificate of Carol King, counsel of record, that it was made in good faith and not for hindrance or delay (R. 226). The affidavit recited, in substance, that Justice Holtzoff had, while legal adviser to the FBI, participated in FBI investigations of aliens and Communists, including an investigation of Eisler, who is an alien Communist, and also that Justice Holtzoff had a personal hatred of Communists, as shown by his sponsoring of anti-Communist legislation and his friendship with and admiration of J. Edgar Hoover, who has used highly intemperate language regarding Communists.

The affidavit further stated that the affiant and his counsel had first learned on May 20, 1947 that Justice Holtzoff was to try the case; that on the same day the petitioner asked his New York counsel if he was obliged to go to trial before Justice Holtzoff in view of the Justice's previous connections with the FBI; that New York counsel arranged to discuss on May 23 in Washington, D. C. with Washington counsel the possibility of filing such an affidavit, but that because of the sudden death of the chief trial counsel's brother on May 23, the conference had to be postponed till May 27. The affidavit was executed in New York City on May 28, 1947 (R. 225) and filed in the District Court for the District of Columbia on May 29, 1947 (R. 222).

The trial began on June 4, 1947 (R. 3, 231) before Justice Holtzoff, who on that day struck the affidavit of prejudice and refused to disqualify himself. (R. 3-6). Thereafter, Justice Holtzoff presided throughout the trial, gave sentence, and signed the judgment (R. 232).

Conduct of the trial court, assigned as error as depriving the petitioner of a fair trial, is described in part V of the argument herein, since it is not readily susceptible to condensed statement.

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The jury returned a verdict of guilty (R. 3). Motions for new trial and for arrest of judgment were argued and denied on June 27, 1947 (R. 182-208, 229, 232), and on the same date the court imposed the maximum sentence — one year's imprisonment and a fine of $1,000 (R. 3, 212, 232).

On June 14, 1948, the Court of Appeals for the District of Columbia affirmed the judgment below, with Justice Prettyman dissenting (R. 233-246). A petition for rehearing was denied on July 17, 1948 (R. 247-252).

SPECIFICATION OF ERRORS TO BE URGED

1. The court below erred in affirming the judgment of the trial court because

(a) the authority of the House Commitee on Un-American Activities to compel testimony under the sanction of punishment for contempt, on its face and as applied generally and in the present case, is unconstitutional as in contravention of the First, Fourth, Fifth, Ninth and Tenth Amendments; and

(b) the statute establishing the House Committee on Un-American Activities, on its face and as construed and applied by the Committee, is unconstitutional as in contravention of the First, Fourth, Fifth, Ninth and Tenth Amendments.

2. The court below erred in affirming the judgment of the trial court because

(a) the prosecution had failed to introduce any evidence to show that the petitioner had been summoned on a matter of inquiry committed to the Committee by Congress or in aid of a legislative function, and conviction in the absence of such evidence denied petitioner's constitutional rights under the Fifth, Ninth and Tenth Amendments; and

(b) the petitioner had not been permitted to introduce evidence to show that the Committee, in summoning him,

was acting beyond its authority, in order to punish him, and not in aid of a legislative function; these exclusions were erroneous, and the conviction also thereby denied the petitioner's constitutional rights under the First, Fifth, Ninth and Tenth Amendments.

3. The court below erred in affirming the judgment of the trial court because the petitioner could not, under the Fifth, Ninth and Tenth Amendments, be validly punished for contempt of the Committee in view of his having been illegally arrested at the Committee's instance and brought before it in custody, and because petitioner was entitled to make a legal objection to his treatment prior to being required to testify, and because his insistence on making such an objection did not violate the statute.

4. The court below erred in affirming the judgment of the trial court because of the failure of the trial judge to disqualify himself upon the filing of the affidavit of bias and prejudice.

5. The court below erred in affirming the judgment of the trial court because petitioner had been denied his constitutional rights to a fair trial under the Fifth Amendment and because the court's charge to the jury in essence directed a verdict of guilty contrary to the Sixth Amendment.

6. The court below erred in affirming the judgment of the trial court because of the erroneous nature of the charge to the jury that "willfully" as used in the statute required only that the appellant had acted intentionally and deliberately, as contrasted with accidentally and inadvertently.

7. The court below erred in affirming the judgment of the trial court because petitioner was not required to testify before the Committee in that

(a) he was an alien in transit detained in this country by governmental authorities against his will; and

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(b) he was, at the time he appeared before the Committee, interned as an enemy alien.

ARGUMENT

I. The Committee on Un-American Activities Is Unconstitutional.

A. The constitutional issue is properly before the Court and should be decided.

No person can validly be punished for withholding from a Congressional committee testimony which Congress may not exact within constitutional limitations. Judicial review is available as to whether the entire subject-matter of an investigation or particular demands made in its course are beyond the jurisdiction of the legislature. *Kilbourn v. Thompson*, 103 U. S. 168; *McGrain v. Daugherty*, 273 U. S. 135, 177-179; *Re Chapman*, 166 U. S. 661; *Sinclair v. United States*, 279 U. S. 263; *Jurney v. MacCracken*, 294 U. S. 125; *Re Pacific R. Commission*, 12 Sawy. 559, 32 Fed. 241. And this is true when section 102 of the Revised Statutes is being applied (*Sinclair v. United States, supra; Re Chapman, supra*), as well as when a House of Congress is imposing legislative punishment (*Jurney v. MacCracken, supra*) or is merely enforcing its process. *McGrain v. Daugherty, supra.* Indeed, were the case otherwise, there would be no substance to Justice Brandeis' assertion that "the ground for such fears [of abuse of the contempt power] has since been effectively removed by the decisions of this Court which hold that assertions of congressional privilege are subject to judicial review." *Jurney v. MacCracken, supra*, at 150.

The authority granted to the Committee on Un-American Activities of the House of Representatives is, we assert and shall demonstrate, in excess of the powers of Congress and an infringement of the liberties of the people. Enforcement of the Committee's process and punishment

for default of its process would violate the bill of rights. For these reasons, the conviction of the petitioner cannot be sustained and the indictment must be dismissed.

It is appropriate that the reversal of the conviction be grounded on this basic constitutional defect rather than on the numerous other errors which exist and which we brief. Disposal of the constitutional issue now will serve the administration of justice in view of the pendency of numerous other cases involving the same subject, and simple justice to a persecuted individual calls for eliminating a retrial if proper grounds exist. Even more important, "Legislation restraining speech, which is excepted from the principle that constitutionality is presumed, should for similar reasons be excepted from the related principle that no ruling on constitutionality is made when a case can be decided on other grounds." Edgerton, J., dissenting in *Barsky v. United States,* 167 F. (2d) 241, 263.

The government has suggested in its opposition to the petition for certiorari that the petitioner cannot raise the issue as to the validity of the Committee's authority because he was not in fact interrogated by the Committee. This suggestion is wholly irrational. The petitioner was convicted of default of the Committee's summons, i. e., of non-appearance as a witness in response to a subpoena, not of refusing to answer questions. There is no sense in a theory that a person may not challenge a demand (to appear) which he resisted, and for which resistance he has been convicted, because an additional demand (to answer a question) was not also made and resisted. The assertion of the power to compel testimony must be sufficiently mature to be tested whenever it is sufficiently mature to support prosecution for resistance. Beyond this, the extent to which the power was asserted affects not the right to test but rather what is being tested. Thus one indicted for refusing to answer a question may dispute not only the Committee's right to compel his appearance but also its right to ask the particular question.

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In brief, petitioner challenges the right of the Committee to summon him and the right of the government to punish him for default of the summons. Since these rights have been asserted against him to his damage, he has standing to challenge them.

Obviously, the most direct means of placing in issue the validity of a summons is to refuse to honor it. And it has always been true that one who has so refused may object to the validity of the summons whether in proceedings brought to enforce it *(cf. Jurney v. MacCracken,* 294 U. S. 125; *Jones v. SEC,* 298 U. S. 1; *Ellis v. ICC,* 237 U. S. 434; *FTC v. American Tobacco Co.,* 264 U. S. 298; *Hickman v. Taylor,* 329 U. S. 495) or in proceedings seeking to vacate it. *Cf. McGrain v. Daugherty, supra.*

B. The nature of the Committee's authority.

1. *The lack of limitations on its authorization to investigate propaganda.*

The Committee on Un-American Activities is authorized by statute to investigate "un-American propaganda activities" and "subversive and un-American propaganda" that "attacks the principle of the form of government as guaranteed by our Constitution." For the purpose of its investigations it may require the attendance and testimony of witnesses and the production of documents. Legislative Reorganization Act of 1946, sec. 121(b), 60 Stat. 828.

The standards contained in this authorization ("un-American," "subversive," and "attacking the principle of the form of government as guaranteed by our Constitution") have no meaning which is even approximately definite by usage, dictionary definition, judicial construction, or administrative interpretations of the Committee. Instead, the key words of the standards are commonly used as epithets of opprobrium for whatever political, social, or moral ideas are distasteful to the person applying the description. *Constitutional Limitations on the Un-American Activities Committee,* 47 Col. L. Rev. 416 (hereinafter

cited as "Note, 47 Col. L. Rev."). "Any political idea that happens to conflict with the economic or political notions of an individual is apt by him to be deemed un-American." *Feinglass v. Reinecke,* 48 F. Supp. 438, 441. Hence the Committee's authority in confined only by the subjective desires and prejudices of its members.

The Committee's authority runs only to the investigation of "propaganda," a word that refers to a dissemination of ideas. "Un-American" propaganda must therefore refer to ideas which are foreign or antagonistic to "American" ideas or beliefs. But it is impossible to develop either a legal or philosophical concept that certain ideas are "American" while others are not. It is unreal to ascribe a geographical location to ideas current in the modern world, and an attempt to do so is particularly fatuous when applied to a country which was settled by persons from other lands and whose culture includes diverse and conflicting strains of political, social and economic thought of foreign inspiration. *Cf.* Parrington, *Main Currents of American Thought* (1927), *passim.* America is a great melting pot of ideas and cultures, as well as of nationalities. Which are we to call "American" and which "un-American"? The ideas of Hamilton or the ideas of Jefferson? Of Franklin D. Roosevelt (which many have labelled as "un-American") or of Alfred Landon? Or the Tories or of Tom Paine? Of Robert Ingersoll or of Mary Baker Eddy? Of Senator Taft or of Eugene Dennis? Of Woodrow Wilson or of Henry Cabot Lodge? And by what system of semantics are ideas "un-American" if they are traceable to the foreigner Karl Marx, while they are "American" if traceable to such other foreigners as Mill, Bacon, Kant, Montesquieu, Paul, and Plato?

Because the Committee's charter lists its standards for investigation in the alternative, the unlimited character of the term "un-American" leaves the Committee's authority unrestricted even if meaning can be found for the word

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"subversive" and the phrase "the principle of the form of government as guaranteed by our Constitution." It happens, however, that these standards too are without content.

The word "subversive" refers to the "overturning" of something. The statute, however, supplies no predicate, and hence no guide is furnished as to what is being overturned. By itself, the word is a meaningless term of abuse usually applied to activities "helpful or benevolent to wage earners, persons on relief, or those who are disadvantaged in the struggle for existence." See Emerson and Helfield, *Loyalty among Government Employees*, 58 Yale L. J. 1, 39, 40 (quoting Attorney General — now Mr. Justice — Jackson). The reference may be to propaganda design to overturn "American" ideas, which leaves the prior dilemma unsolved.

"The principle of the form of government as guaranteed by our Constitution" is no less vague. This Court was unable to isolate the "principles of the Constitution" in *Schneiderman v. United States*, 320 U. S. 118. In *United States v. Schwimmer*, 279 U. S. 644, the Court considered a "lack of nationalistic sense" (at 653) to be opposed to the principles of the Constitution. But this view (which might subject to the Committee's scrutiny literature of, say, organizations favoring Union Now) was reversed in *Girouard v. United States*, 328 U. S. 61, after having been repudiated in the *Schneiderman* case, which refused to hold "that petitioner is not attached to the Constitution by reason of his possible belief in the creation of some form of world union of soviet republics" (at 145). The Court suggested in the *Schneiderman* case that if any principle of the Constitution is essential it is the guaranty of freedom of thought (at 138, 144),[2] and stated (at 137, 138) that the Constitution itself refutes "the idea that attachment to any particular provision or provisions is essential, or that one who advocates radical changes is necessarily not attached to the Constitution."

[2] To the same effect: Justice Holmes, dissenting, in *United States v. Schwimmer*, 279 U. S. 644, 654, 655; Chief Justice Hughes, dissenting, in *United States v. Macintosh*, 283 U. S. 605, 635.

It can be argued perhaps that the principles of the Constitution consist of certain libertarian concepts of the kind offered by Chief Justice Stone, dissenting, in the *Schneiderman* case (see at 181). Or perhaps one may urge the definition of the District of Columbia Court of Appeals: "The basic concept of the American system, both historically and philosophically, is that government is an instrumentality created by the people, who alone are the original possessors of rights and who alone have the power to create government. . . . The prime function of government, in the American concept, is to preserve and protect the rights of the people." *Barsky v. United States,* 167 F. (2d) 241, 245, 246.

But these formulations, no matter how aptly expressed, are so general that their application to virtually every field of dissenting utterance depends on the economic or moral beliefs of the persons who apply them. Thus Justices Stone and Prettyman applied them, in the cases cited, simply so as to fuse the principles of the Constitution with the maintenance of a capitalist economy against Marxist conceptions. Their assumption, in short, was that the Constitution enacts capitalism, and in this they were as erroneous as an earlier court which assumed that the Fourteenth Amendment enacts Mr. Herbert Spencer's Social Statics. *Cf.* Holmes, J., dissenting in *Lochner v. New York,* 198 U. S. 45, 75; Frankfurter, J., concurring in *AFL v. Northwestern Iron & Steel Co.,* ..... U. S. ....., Jan. 3, 1949. "But a Constitution is not intended to embody a particular economic theory" (Holmes, J., *loc. cit.*), and it is hard to believe that the Constitution gives legislatures or courts carte blanche to embody in its terms their economic or moral beliefs (*cf.* Holmes, J., dissenting in *Baldwin v. Missouri,* 281 U. S. 586, 595) or "to treat as unconstitutional what goes against the grain." Frankfurter, J., *loc. cit.* To Justice Holmes, at least, it was clear that the Constitution itself protected the advocacy of proletarian dictatorship. *Gitlow v. New York,* 268 U. S.

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652, 673 (dissent). And to the sophisticated it must seem strange that espousal of a doctrine adhered to by millions of persons is incompatible with a Constitution whose most essential doctrine is freedom of thought. (*Cf* Thomas Mann: "I testify, moreover, that to my mind the ignorant and superstitious persecution of the believers in a political and economic doctrine which is, after all, the creation of great minds and great thinkers — I testify that this persecution is not only degrading for the persecutors themselves but also very harmful to the cultural reputation of this country. . . . Spiritual intolerance, political inquisitions, and declining legal security, and all this in the name of an alleged 'state of emergency' . . . that is how it started in Germany." Foreword to Kahn, *Hollywood on Trial* (1948), v.).

The obscurity of the statutory phraseology is compounded by the assumption that there is some one principle of the Constitution. Justice Edgerton, dissenting in the *Barsky* case, *supra*, at 262, has shown the difficulty of the expression:

> Does 'the principle of the form of government' here mean the republican or democratic principle only, or does it include e. g. the constitutional duty of courts not to enforce unconstitutional legislation? This court puts a plural where Congress put a singular, and says 'the principles . . . are obvious.' To me it is not obvious how much Congress meant by 'the principle,' or how much the court means, by 'the principles', or that the two meanings are identical. Both because 'the principle' is vague and because 'attacks' is vague, I do not know whether propaganda 'attacks the principle' if, e. g., it advocates a constitutional amendment replacing the American principle of judicial review by the British principle of legislative supremacy.

Nor can it be assumed that advocacy of political change by non-peaceful means (*cf. Barsky v. United States*, 167 F. (2d) 241, 246) is contrary to a Constitutional principle. Such an assumption is irrelevant since, as will more fully appear, neither the authority of the Committee nor the Committee's application of its authority is directed to in-

vestigation of advocacy of violence. In any event, the assumption is an anachronism which is inconsistent with the scope intended for the First Amendment. *Cf. Musser v. Utah*, 333 U. S. 95, 102 (Rutledge, J., dissenting). The Constitution itself protected the right of William Lloyd Garrison to call it a "covenant with death and an agreement with hell" and to burn a copy of it at a public meeting. Lincoln only echoed the second paragraph of the Declaration of Independence when he declared, in his inaugural address, that whenever the people "shall grow weary of the existing government, they can exercise their constitutional right of amending it, or their revolutionary right to dismember or overthrow it."

In the political field our tradition is one of turbulence, disagreement, and even rebellion. As one of our most eminent historians has recently written (Henry Steele Commager, *Who Is Loyal to America?*, Harper's Magazine, Sept. 1947, 193, 196):

> True loyalty may require, in fact, what appears to the naive to be disloyalty. It may require hostility to certain provisions of the Constitution itself, and historians have not concluded that those who subscribed to the 'Higher Law' were lacking in patriotism. We should not forget that our tradition is one of protest and revolt, and it is stultifying to celebrate the rebels of the past—Jefferson and Paine, Emerson and Thoreau—while we silence the rebels of the present.
>
> 'We are a rebellious nation,' said Theodore Parker, known in his day as the Great American Preacher, and went on: 'Our whole history is treason; our blood was attainted before we were born; our creeds are infidelity to the mother church; our constitution, treason to our fatherland. What of that? Though all the governors in the world bid us commit treason against man, and set the example, let us never submit.'

If, therefore, anything is genuinely "un-American" or contrary to the "principles" of our Constitution, it is an attempt by a governmental body to compel conformity. "If there is any fixed star in our constitutional constella-

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tion, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein". *W. Va. Board of Education v. Barnette,* 319 U. S. 624, 642.

Where statutory terms are obscure, it is customary to seek clarification in the legislative debates and in administrative construction and practice. The debates on the reenwal of the Committee's authority, since its origin in 1938 as a select committee,[3] fail to supply any content to the terms of its authorization. On the contrary, they indicate the legislature's full awareness of the lack of meaning of the terms. "Indeed, the purpose seems to have been to give the Committee a roving commission to inquire into any propaganda activities which a majority of the Commitee thought warranted investigation." Note, 47 Col. L. Rev., at 422.

At no time in the course of the debates did the proponents of the Committee indicate the meaning of its authority although they were persistently challenged to do so. Thus Representative Johnson said: "What I would like to find out is what is un-American. I cannot seem to get anybody on the committee to give us a definition of that." 81 Cong. Rec. 3286 (1937). Representative Outland expressed similar difficulty:

> Just what are subversive activities? Who is to be the judge? There have been people who have called the chairman of the committee subversive, which in my opinion is entirely incorrect. But the permitting of individual interpretation of just what is deemed sub-

[3] The Committee was created in 1938, was renewed each year till 1945, was made a standing committee in that year, and was retained as a standing committee by the Legislative Reorganization Act of 1946. Note, 47 Col. L. Rev., at 417, citing the legislative authorities in footnotes 8, 9 and 10. The authority granted to the temporary Committees was the same as that granted to the standing Committee. Accordingly, no distinction is here made as between the several temporary Committees and the standing Committee, in discussing the meaning of the authorization, including its administrative interpretations.

> versive is a dangerous and un-American thing. [89 Cong. Rec. 806 (1943).]

On July 18, 1946, the chief counsel of the Committee wrote Representative Doyle: "The Committee has adopted no definition of subversive or un-American activities." 92 Cong. Rec. A4743 (1946). Mr. Doyle commented:

> Ever since I became a member of this Seventy-ninth Congress, I have sought to ascertain by what definition of 'subversive activity' or 'un-American activity' a person was to be measured as either a loyal or disloyal American citizen. No one seemed to find any high court citation used by the House Committee nor could I find any printed or any announced definition which the Committee had to either guide or limit its activities.
>
> • • • •
>
> This illustrates that there can be at present as many definitions of 'subversive and un-American' as there are committee members. In fact, I think I notice that there is sharp difference of opinion expressed by committee members on this point [*Ibid.*]

The Committee's own construction of its authority should be particularly informative, because the Congressional reenactments of the Committee's powers constitute legislative acceptance of the Committee's views and practices. The Committee has, however, never defined what propaganda is "un-American" or "subversive" or "attacks the principle of the form of government as guaranteed by our Constitution." On the contrary, the Committee considers its writ to run to all propaganda. Thus Representative Wood, when chairman of the Committee, stated at one of its hearings that "the committee is empowered to investigate any activities of any organization or any individual. The committee conceives it to be within its scope to investigate the activities of any organization that expounds American [*sic*] principles of government." *Hearings on Communist Party,* Committee on Un-American Activities, H. Res. 5, 79th Cong., 1st Sess., Sept. 27, 1945, p. 31. And the Committee's investigations have covered such a wide range of

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subjects as to show that it has in fact recognized no restrictions. It has taken "as its field the whole gamut of American political, social and economic life" in an "almost unlimited variety" of investigations. Note, 47 Col. L. Rev., at 418.

Although it has not defined the terms "un-American" and "subversive," the Committee's reports amply demonstrate that the expressions fit whatever views its members dislike. Thus "criteria which the Committee or its agents have from time to time suggested as indicative of activity within the scope of its inquiries are: opposition to 'the American system of checks and balances,' opposition to the protection of property rights, belief in dictatorship, opposition to the Franco government of Spain, opposition to General MacArthur, advocacy of a world state, advocacy of the dissolution of the British Empire, criticism of members of Congress, and criticism of the Committee on Un-American Activities." *Id.*, at 422, 423, giving supporting citations.

We are thus left with this conclusion: the legislative description of the Committee's authority has no meaning in usage, legislative history, judicial construction or administrative practice from which either the Committee or the courts may derive a standard which can be applied in law. The Committee, therefore, is free to investigate whatever expressions it pleases, with no limits whatsoever.

2. *The Committee's role as a censor.*

A direction that a committee investigate whatever it pleases can hardly be instigated by a desire to obtain facts through investigation. The key to an understanding of the Committee on Un-American Activities is the circumstance that it is not, and is not intended to be, an investigative agent of the legislature in the sense that it is meant to obtain and report information for legislative guidance. Instead, its function, which has been adopted

by legislative re-enactment of the Committee, is to be a political censor of opinion and expression, and its inquiry powers exist only so that it may discharge this function.

This function is inherent in, and inevitable to, the grant of jurisdiction to investigate "un-American" and "subversive" propaganda (i.e., to investigate the propagation of "un-American" and "subversive" ideas.) To exercise this jurisdiction, the Committee must necessarily determine which ideas are "un-American" or "subversive." It thus imposes censorship of expression, since most people are unwilling or afraid to advocate, or even to listen to, ideas which the government has stigmatized as being disloyal. Censorship is effectuated directly when offending expression is suppressed. It is effectuated indirectly, but no less effectively, when sanctions are imposed on those who express or listen to offending sentiments. By classifying ideas as "un-American" and "subversive," the Committee imposes on their advocates and audiences the sanction of public odium and obloquy, with all its attendant social, political and economic consequences.

The Committee's censorship is aggravated by the fact that its censorship code is, as we have seen, so undefined as to represent only the subjective prejudices of the Committee's members. Another aggravating characteristic is that those who violate the code are not tried and then turned over to the official jailer, but instead are delivered, without trial, to the hazards of popular retribution. These are at once random, unpredictable and often extremely severe. A person "exposed" by the Committee may find his economic and professional career destroyed, his social and family relationships broken, and his reputation smeared beyond redemption. He may be subjected to mob violence and to discriminatory prosecutions and deportation proceedings. In short, the Committee turns its victims over to lynch law, and, as in more orthodox lynchings, the result is not only injury to the one lynched but a brutalizing and demoralizing effect on those who do the lynching.

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Official sources, as well as studies of the Committee's operations,[4] demonstrate that the function of the Committee is to censor expression by "exposing" persons to the consequences of "public sentiment" (i. e., to lynch law). We can in this brief refer to only a small portion of the mass of material.

(a) Statement of Congressman Dies, first chairman of Committee, on floor of House when Committee was first created.

> . . . I am not in a position to say whether we can legislate effectively in reference to this matter, but I do know that exposure in a democracy of subversive activities is the most effective weapon that we have in our possession. Always we must keep in mind that in any legislative attempt to prevent un-American activities, we might jeopardize fundamental rights far more important than the objective we seek, but when these activities are exposed, when the light of day is brought to bear upon them, we can trust public sentiment in this country to do the rest. 83 Cong. Rec. 7570 (1938).

(b) 1939 Committee report.

> While Congress does not have the power to deny citizens the right to believe in, teach, or advocate communism, fascism, and nazism, it does have the right to focus the spotlight of publicity upon their activities. [H. R. Rep. No. 2, 76th Cong., 1st Sess. 13 (1939).]

(c) 1940 Commitee report.

> One method which can and should from time to time be used is the method of investigation to inform the American people of the activities of any such ["subversive"] organizations. This is the real purpose of the House Committee to Investigate un-American Activities. [H. R. Rep., No. 1476, 76th Cong., 3d Sess., 1, 2.]
>
> The purpose of this committee is the task of protecting our constitutional democracy by turning the light

[4] *Cf.* Ogden, The Dies Committee (2d ed. 1945); Note, 47 Col. L. Rev., *supra;* 14 U. of Chi. L. Rev. 256; 46 Mich. L. Rev. 521.

of pitiless publicity on the activities of organizations seeking to work the will of foreign dictators in the United States or to destroy our constitutional democracy and set up a totalitarian regime . . . . [*Id.* p. 24.]

(d) 1941 Committee report.

It is the way of exposure—a way which conforms to the letter and spirit of democracy, and is at the same time more effective than a Gestapo. [H. R. Rep. No. 1, 77th Congress, 1st Sess., 23, 24 (1941).]

This committee is the only agency of Government that has the power of exposure. No other agency can require witnesses to appear before it and testify under oath with respect to un-American activities and subversive propaganda. No other agency of Government has the power to subpoena records and documents of un-American organizations, and individuals, except under unusual circumstances. There are many phases of un-American activities that cannot be reached by legislation or administrative action. [Id., p. 24.]

(e) In 1943, the Committee, reporting that discovery and exposure were its "special function" by mandate from the House (H. R. Rep. No. 2748, 77th Cong., 2d Sess. 2 (1943)), published the names, positions and salaries of 563 government employees as members of the American League for Peace and Democracy. "The committee felt that the Congress and the people were entitled to know who they were." *Id.* pp. 4-5.

(f) 1947 Committee report.

The Federal Bureau of Investigation is able to detect and apprehend criminal acts of un-Americanism; the House Committee on Un-American Activities is empowered to explore and expose activities by un-American individuals and organizations which, while sometimes being legal, are nonetheless inimical to our American concepts and our American future. [H. R. Rep. No. 2742, 79th Cong., 2d Sess., 16 (1947).]

(g) Statement of Representative Thomas.

Mr. J. Parnell Thomas, Chairman of the Committee, recently said in a radio address:

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The chief function of the committee, however, has always been the exposure of un-American activities. This is based upon the conviction that the American public will not tolerate efforts to subvert or destroy the American system of government, once such efforts have been pointed out. The Congress' right to investigate and expose undemocratic forces is as established and untrammeled as our Constitution. [93 Cong. Rec., A4277 (1947).]

(h) Statements of Representative Rankin.

Mr. Rankin, a leading member of the Committee, said in 1945:

"I serve notice on the Un-American elements in this country now that this 'grand jury' will be in session to investigate un-American activities at all times. [91 Cong. Rec., 275 (1945).]

Mr. Rankin has said, in the present record, that the Commitee is a 'grand jury' to which 'defense counsel' should not be admitted. [Justice Edgerton in *Barsky's* case, *supra,* at 256, footnote 19.]

(i) *Statement of Representative Mundt.*

Our task—to which you members of this House assigned us—is to seek out and to expose those activities which although legal are nonetheless un-American, subversive, and contrary to the American concept.

• • • •

May I interpolate here, Mr. Speaker, to remind the House that in voting favorably as it did on the contempt citations which our committee has brought before you that you stand foursquare with that great constitutional lawyer, Mr. [John W.] Davis, who recommends that the spotlight of publicity be turned on organizations accused of subversive activities. [92 Cong. Rec. 5217 (1946).]

(j) *Statement of Representatives Mundt and Nixon.*

If this committee is not to operate entirely in secret, it cannot avoid making headlines unless it avoids activities in fulfillment of its mandate from Congress to help disclose and curb un-American activities. ["Mundt-Nixon Proposals" (for reform of Committee proce-

dure) of Dec. 27, 1948, in *N. Y. Herald Tribune,* Dec. 28, 1948, p. 19.]

It would be a mistake to infer from the foregoing that the Committee merely "exposes" and subjects to "pitiless publicity" "un-American" views and expressions, after which it allows "public sentiment" to take its course. The Committee is not content to abide by the automatic processes of the public sentiment in which it ostensibly places such great faith. Instead, it stimulates that sentiment to an application of economic lynch law by setting up a vast machinery for blacklisting purposes and by urging (more appropriately, "demanding") the discharge of individuals whose views it dislikes.

The Committee has openly stated that one of its purposes is to eliminate from public and private employment and from trade-union offices those whom it considers "subversive." 9 *Hearings before Special Committee to Investigate Un-American Activities on H. R. 282,* p. 5447 (1939); see Note p. 418. This Court has recognized the Committee's responsibility for legislation unconstitutionally blacklisting for federal employment named persons. *United States v. Lovett,* 328 U. S. 303, 308. The Committee has compiled a blacklist, carefully cross-indexed, of the names of one million "subversive" persons and over 1,000 "subversive" organizations. H. R. Rep. No. 2748, 77th Cong., 2d Sess., 2, 3, (1943); H. R. Rep. 2742, 79th Cong., 2d Sess., 16 (1947); 89 Cong. Rec. 797 (1943) (remarks of Rep. Thomas). From this list it supplies names of "subversive" persons to their public and private employers, and its files are available to intelligence agencies. H. R. 2742, *loc cit.;* see remarks of Congressman Dies, 87 Cong. Rec. 897 (1941). The Committee has officially attributed its success in building up these huge files to its subpoena powers. H. R. Rep. 2748, 77th Cong., 2d Sess., 2, 3 (1943).

One of the accomplishments of the Committee's Hollywood hearings was the discharge from employment of ten

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prominent employees of the movie industry and their blacklisting by the studios. See Kahn, *Hollywood on Trial*, 184 (1948). This result the Committee openly demanded from executives of an industry notoriously concerned with public opinion, as appears throughout the questioning of the producers who testified. *Hearings Regarding the Communist Infiltration of the Motion Picture Industry*, Committee on Un-American Activities, 80th Cong., 1st Sess. (1947). Thus Representative Vail repeatedly prodded producer Jack Warner with the suggestion that the Motion Picture Producers Association should set up a blacklist for "the elimination of the writers and the actors to whom definite communistic leanings can be traced." *Id.* at 52, 53. He later explained that the Committee had "the problem of eliminating the Communist element from not only the Hollywood scene but also other scenes in America, and we have to have the full support and cooperation of the executives from each of those divisions." *Id.* at 66. Chairman Thomas persistently demanded that the industry should "set about immediately to clean its own house" of the harmful presence of "known Communists" and "not wait for public opinion to force it to do so." *Id.* at 522, 393. Committee investigator Stripling proposed that "the most effective way of removing these Communist influences—and I say Communist influences: I am not saying Communists; I am not accusing them all of being Communists"—is to "cut these people off the pay roll." *Id.* at 49, 50.

Linked with this approach toward censorship of the movies was the drive of the Committee throughout the Hollywood hearings to coerce the industry to make movies of a kind which would conform to views of the Committee. The method used was on the one hand to attack, or to provide a sympathetic forum for witnesses to attack certain movies as being "pro-Communist" (see, *e. g.*, *id.* at 83-90, 93, 138, 166, 231-234), and, on the other, to urge that the producers make more "anti-Communist" pictures (see,

e. g., at 28, 29, 76, 144, 145, 170, 212, 226, 227). Thus the picture "None But the Lonely Heart" was "exposed" as containing Communist propaganda because it "is moody and somber throughout, in the Russian manner" and the son in the story tells his mother, who runs a second-hand store, "You are not going to get me to work here and squeeze pennies out of little people poorer than I am" (*id.* at 232, 234). And illustrative of the second phase of this effort is the following colloquy:

> THE CHAIRMAN. Well, has the industry the will to make anti-Communist pictures?
>
> MR. McGUINNESS. I think the industry is acquiring it.
>
> • • • •
>
> THE CHAIRMAN. Mr. McGuinness, will these public hearings aid the industry in giving it the will to make these pictures?
>
> MR. McGUINNESS. It is my opinion that they will. [*Id.* at 145.]

An important part of the Committee's censorship system is to distort before "exposing," so that its "exposures" consist largely of publicizing smearing conclusions based on gossip, hearsay, and the process of ascribing guilt by association. The Committee's customary practice in this regard is to conclude, from such "evidence," that any person or organization under its scrutiny who does not share its views is a Communist or Communist sympathizer, and thereupon to "expose" him or it as such.

> Under the guise of attacking Communism he [Mr. Dies] was able to attack all so-called liberal ideas in the field of politics and economics. This was done by pinning the label of Communism on all persons who belonged to any society or organization in which there ever had been any Communist member, or any idea, theory, or action of which any Communist had ever approved. [Cushman, *Civil Liberty and Public Opin-*

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ion, in *Safeguarding Civil Liberty Today; Edward L. Bernays Lectures of 1944 given at Cornell University* (1945), 100, 101.]

The marshalling of proof of the Committee's practice of censoring by smearing is impeded by an *embarass de richesses,* there being hardly a Committee report which does not demonstrate the technic. The utter irresponsibility of one such report, H. R. Rep. No. 592, 80th Cong., 1st Sess. (1947), dealing with the Southern Conference for Human Welfare, has been convincingly demonstrated in Gellhorn, *Report on a Report of the House Committee on Un-American Activities,* 60 Harv. L. Rev. 1193. Professor Robert E. Cushman observed that he and Professor Carl L. Becker had been placed on the Committee's "subversive" list because they had been among thousands of signers of a petition to President Roosevelt to recognize the Soviet Union (an action which, of course, Mr. Roosevelt subsequently took). Cushman, *loc. cit.* In one of its reports the Committee graphically illustrated that it applies the doctrine of guilt by association by a system of cross fertilization. It published a chart which lists vertically the names of fifty individuals (including Melvyn Douglas, Lewis Gannett, Frank P. Graham, Stanley Isaacs, Gardner Jackson, Frank Kingdon, Freda Kirchway, Ludwig Lore, and Reinhold Neibuhr) and horizontally the names of twenty-five organizations or activities (the latter including the acts of contributing to certain periodicals, having works published by certain publishers, and signing an open letter for closer cooperation with the Soviet Union). Within the boxes formed by the intersecting vertical and horizontal lines placed a check to show with what organizations and activities each of the individuals listed was identified. From this chart, presumably, one is to conclude that the persons named are subversive by virtue of their affiliation with the organizations, and the organizations are subversive because of the persons who are affiliated with them. H. R. Rep. No. 2277, 77th

Cong., 2d Sess., 9-22 (1942). Elsewhere it made the following logical deduction:

> Inasmuch as we are in receipt of reliable information that Mexico City is now the center of Communist activities in the western hemisphere, the figure would lead one to believe that it is entirely possible that a considerable portion of the $250,000.00 referred to [money sent by Joint Anti-Fascist Refugee Committee for refugees in Mexico City] was used for purposes other than medical aid and relief. [H. R. Rep. No. 2233, 79th Cong., 2d Sess. 37 (1946).]

Recently, the Committee has spent considerable time investigating espionage. See, e. g., *Hearings Regarding Communist Espionage in the United States Government*, 80th Cong., 2d Sess. 501-1378 (1948). An investigation of undercover espionage is obviously far removed from a genuine investigation of propaganda, and therefore not by any stretch within the Committee's jurisdiction. It does, however, represent fundamental spade-work in the Committee's system of censorship. As we have seen, it is a favorite device of the Committee to "expose" people by linking them with Communism. The success of this tactic depends on the existence of a public dislike for Communism, and it is therefore appropriate for the Committee to stimulate this dislike. Additional reasons for the investigation, of course, were the opportunities it afforded for attacks on the executive branch of the Government, for urging legislation restricting speech and assembly, and for bolstering a waning prestige. *Cf.* interim Committee report, *id.* at 1354, 1356, 1357; communication of Prof. Zachariah Chafee, Jr. in *Washington Post*, Dec. 13, 1948, p. 9. The Committee, of course, conducted its espionage inquiry, with great publicity, since otherwise its propaganda purpose would have failed. As a result, President Truman was impelled to declare that its investigation violated the Bill of Rights (Washington Evening Star, Aug. 19, 1948, p. 1), while the Attorney General condemned it as "an

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attempted encroachment upon the independent integrity of a coordinate branch of government" and as "contrary to our democratic system." *Department of Justice Release,* Sept. 29, 1948.

Also illustrative of the Committee's propaganda activities designed to bolster its censorship system is its recent publication of four popularized pamphlets in question and answer form: *"100 Things You Should Know About—Communism in the U. S. A.; Communism and Religion; Communism and Education; Communism and Labor* (Govt. Printing Office). These pamphlets are not reports to Congress, but are on public sale at ten cents each. So far from reporting on results of investigations of "un-American" propaganda, these deal with such subjects as "Was Marx Crazy?" (Answer: "Perhaps") (in *Communism and Religion,* p. 5); "Was Russia a very religious country before?" (The answer is obscure.) (*id.,* p. 7); "Does Stalin let American Communists in to see him?" (Answer: "Yes") (*Communism in the U. S. A.,* p. 14); "What is treason?" (Answer quotes the Constitution) (*id.,* p. 17); "Are the Communists committing treason today?" (Answer: they are committing "cold war treason") (*id.,* p. 17); "But don't we have more of all the best natural resources than any other people?" (Answer: no. Russia has a lot of natural resources) (*Communism and Education,* p. 11); "What about the Wallace youth groups?" (Answer: "More tools of the Communist Party") (*id.,* p. 17); "What happens if a Russian wants to quit his job?" (The answer is obscure except as to admonition to read "I Chose Freedom" by Victor Kravchenko.) (*Communism and Labor,* p. 7).

The Committee published under date of December 18, 1948 a pamphlet entitled, "Citations by Official Government Agencies of Organizations and Publications Found To Be Communist or Communist Fronts." This lists in alphabetical order 531 organizations and 87 publications

and shows which government agencies have cited them as being Communist or Communist Fronts. Needless to say, the list was compiled and published without the organizations named having been given hearings or opportunity for self-defense. The "official government agencies" consist chiefly of the Committee itself and of the California and Massachusetts "little un-American Activities Committees." They also include the Attorney General, "Pennsylvania Commonwealth Counsel before the reviewing board of the Philadelphia County Board of Assistance" (*e. g.*, pg. 3), the New York Rapp-Coudert committee (*e. g.*, pg. 13), and others. Among the organizations cited are: Allied Voters against Coudert; American Friends of Spanish Democracy; American Investors Union, Inc.; American Labor Party; American Relief Ship for Spain (whose citation is by the Committee itself for raising "funds for the Communist end of that civil war"); Book Find Club; Citizens Committee for Harry Bridges (cited by Committee itself as having been "formed to oppose deportation of Harry Bridges, Communist Party member"; *cf. Bridges* v. *Wixon*, 326 U. S. 135); Citizens' Committee to Aid Locked-Out Hearst Employees; [Los Angeles] City Action Committee against the High Cost of Living; Committee for a Boycott against Japanese Aggression; Committee for the First Amendment; Committee of One Thousand; Committee to Defend Angelo Herndon (*cf. Herndon* v. *Lowry*, 301 U. S. 242); Commonwealth College; Consumers Union; Federated Press; Group Theatre; Independent Citizens Committee of the Arts, Sciences, and Professions; International Juridical Association; Joint Committee of Trade Unions on Social Work; League of Women Shoppers; Methodist Federation for Social Service; Milk Consumers Protective Committee; Mooney Defense Committee (*cf. Mooney* v. *Holohan*, 294 U. S. 103); National Committee to Abolish the Poll Tax; National Lawyers' Guild; Nature Friends of America (cited by Massachusetts committee as "another method of recruiting Communist support by means of outdoor activi-

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ties"); Non-Partisan Committee for the Re-election of Vito Marcantonio; Progressive Citizens of America; Scottsboro Defense Committee (*cf. Powell* v. *Alabama*, 287 U. S. 45; *Norris* v. *Alabama*, 294 U. S. 587); Southern Conference for Human Welfare; Sweethearts of Servicemen (cited by Committee itself: "Its maiden effort was a delegation of 75 young women who arrived in Washington to petition Congress 'to give their soldier boy friends and husbands the chance to vote in the 1944 Presidential elections.' ").

The Committee's censorship applies not only to publication of opinion, but to the right of assembly generally. It is not only the propaganda of an organization that is "exposed" to public lynch law, but the organization itself. Thus the Committee has boasted that it "had a large part in breaking up the People's Front" and in diminishing the prestige and following of the American Youth Congress. (H. R. Rep. No. 1, 77th Cong., 1st Sess. 21 (1941)). It is as if a board of censors suppressed not only a book but its publishers as well.

In a system of direct censorship, the censoring agency would presumably be subject to rules which would conform with procedural due process. No such rules apply to or are used by the Committee. Findings of "subversiveness," the equivalent of an edict of suppression, are often made without giving any hearing to those concerned, as was the case with the report on the Southern Conference for Human Welfare (see Gellhorn, *op. cit.*), and in no case does the Committee recognize rights of confrontation, cross-examination, putting on of rebuttal evidence, etc. "The rights you have," said Chairman Thomas when he directed counsel for a witness to testify, and counsel insisted that he in turn had a right to counsel, "are the rights given you by this committee. We will determine what rights you have and what rights you have not got before the committee." *Espionage Hearings, supra,* at 1310.

In implementing its censorship functions, the Committee persistently abuses its powers of process. One instance is presented by the record in this case, involving as it does the illegal arrest of the petitioner and the issuance of the contempt citation for reasons unconnected with an interest in obtaining testimony (see *infra*, footnote 5). Others involve the exacting from witnesses of compurgatory oaths and the prying into their political beliefs, as in the Hollywood hearings (*op. cit.*). Witnesses who claim their constitutional privilege against self-incrimination are relentlessly badgered (*cf. Espionage Hearings, supra,* 1329-1341; 818-835), as is their counsel (*id.* 1308-1310). On one occasion, the Committee forced counsel for a witness to testify because it disliked the witness' claim of privilege (*ibid.*, and at 1342-1346), and recently it harassed a witness because the counsel he had consulted represents the petitioner in this case. *Washington Evening Star* (final edition), Dec. 9, 1948, p. A-5; *Washington Post,* Dec. 10, 1948, p. 8; *N. Y. Herald Tribune,* Dec. 10, 1948, p. 16.

Witnesses are called upon not to supply information by testimony, but so that they may "clear themselves" and are cited for contempt if they disavow the opportunity. They become "defendants" under a burden of proof, and are publicly invited to subject themselves to lie-detector tests.

> Hiss will be given every opportunity to reconcile the conflicting portions of his testimony, but the confrontation of the two men and the attendant testimony from both witnesses has definitely shifted the burden of proof from Chambers to Hiss, in the opinion of this committee. [Interim report of the Committee in *Espionage Hearings, supra,* at 1349.]

The Committee's hearings are elaborately staged publicity performances, replete with all attendant modern paraphernalia—flood lights, radio recorders, still cameras, mo-

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tion picture cameras, etc.,—and designed to develop at least one good headline story a day. One of the recurring features of these "hearings" is the impaling for public edification of witnesses whom the Committee dislikes. (For a description of one such "hearing" see Martha Gellhorn, *Cry Shame,* New Republic, Oct. 6, 1947, p. 20.) No one, least of all the Committee, anticipates that these witnesses will furnish information for legislative guidance; their function is to be the object of a gladiatorial sport. Thus it is a Committee practice to hold open hearings for the sole purpose of "hearing" witnesses who, as they know on the basis of a closed session, will not furnish information but will claim their constitutional privilege against self-incrimination. "As soon as the witness arrives, he [Acting Committee Chairman Mundt] said, he will be questioned behind closed doors 'to find out what material is available.' If he refuses to answer the committee's questions, Mr. Mundt went on, the hearing will become public. That was the procedure followed yesterday when the committee questioned Mr. Wadleigh, who refused to tell the committee whether he ever gave any restricted State Department documents to Mr. Chambers or ever belonged to a ring organized to furnish American secrets to a foreign power." *Washington Evening Star,* Dec. 10, 1948, p. A-6.

Where the Inquisition, then, had its rack, the Committee has its hearing, the difference being that the advance of culture and refinement has substituted mental and nervous torture for physical torture.

We do not argue that the Committee is invalid merely because it has sinned, even though, so far as we can discover, it has never done anything else. The point is that the Committee was intentionally and inevitably vested with censorship functions when it was equipped with formidable powers of inquiry which, on the one hand, were not limited by any concept capable of application and, on the other, were oriented by language which requires an invidious

classification of ideas and expressions. Without restraint and with such orientation, the Committee on Un-American Activities erected its system of censorship quite naturally and within the legislative grant of authority. "The case is," said Justice Edgerton, dissenting in *Barsky's* case, *supra,* at 259, 260, "as if the enabling Act read 'The Committee shall expose unorthodox propaganda in order to restrain and punish it.' " The key features of this censorship system may be summarized as follows:

1. The function of the Committee is to exercise censorship through the use of its powers of inquiry and compulsion of testimony.

2. The basic technic of the censorship is to "expose" to adverse public sentiment individuals and organizations holding views of which the Committee disapproves. The purpose of this "exposure" is not primarily to harm those individuals and organizations, though that result follows, but to fulfill the true function of censorship—*i. e.*, the suppression of ideas which are deemed harmful to the political, social or economic interests of those who institute the censorship.

3. In order that this technic be effective, it is important that "exposure" bring drastic consequences to those "exposed." Rather than leave the advent of such consequences wholly to fortune, the Committee stimulates their operation by such methods as setting up blacklists of its own and hounding public and private employers to follow suit.

4. It is also important to this technic that whatever is "exposed" have an ugly appearance to the general public. Since not all the individuals, organizations and ideas disliked by the censors would have such an appearance if fairly presented, it is frequently necessary for the Committee to present them unfairly—i. e., to smear when "exposing."

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5. But in order to make sure that the smear will be successful, the Committee can not afford to use methods of procedural due process, since these might enable a selected victim to defeat the smear.

6. The essence of the smear tactics is to identify an individual or organization with something unpopular—ordinarily, Communism. The Committee, therefore, from time to time seeks to strengthen the popular feeling against Communism. This it does by creating propaganda of its own against Communism, as in the case of its public spy-hunts and popularized pamphlets, and by coercing media like the movies into creating similar propaganda.

7. The success of the technic is dependent on the extent and nature of the publicity given to the Committee's exposures. Therefore, the Committee stages spectacles, which it calls "hearings," designed to attract the utmost publicity. When a witness frustrates this purpose, at least in part, by refusing to testify, the Committee bitterly reacts and attempts to punish him and his counsel.

The question to be here decided is whether this fabulous system is consistent with the Constitution.

C. The Committee and the Constitution.

1. *The First Amendment.*

"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." By these words, the founders of a nation sought at once to protect the human impulse of self-expression and to preserve popular self-government. "The First Amendment protects two kinds of interest in free speech. There is an individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course but carry it out in the wisest way." Chafee, *Free Speech in the United States* (1942) 33.

The founders understood that people govern themselves only when they are free to choose, and that freedom of choice does not exist without freedom to hear all the alternatives offered. "The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them." Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948) 88, 89. "The safeguarding of these rights [of speech and press] to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government." *Thornhill v. Alabama,* 310 U. S. 88, 95.

The suppression of public discussion of doctrines that are considered dangerous or in periods that are considered critical is, then, a negation of self-government itself. It assumes that self-government can be trusted to operate only at non-critical times and on non-controversial issues. The founders of our nation, however, trusted no other form of government. Accordingly, "freedom to differ is not limited to things that do not matter much." *W. Va. Bd. of Education v. Barnette,* 319 U. S. 624, 642. Doctrines must be allowed a hearing even though they threaten vested economic and social interests. "If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." Holmes, J. dissenting in *Gitlow v. New York,* 268 U. S. 652, 673. The founders were fearful not of what the people would choose, but that they would be denied the right to choose. "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty." Brandeis, J. in *Whitney v. California,* 274 U. S. 357, 377. It is only by free discussion,

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not by a fearful suppression of discussion, that truth can be attained. "Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in these fields may be refuted and their evil averted by the courageous exercise of the right of free discussion." *Thornhill v. Alabama, supra,* at 95.

The state, therefore, cannot proscribe doctrine or censor expression as being dangerous or false.

> But it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us. [Jackson, J., concurring in *Thomas v. Collins,* 323 U. S. 516, 545.]

The authority of the Committee on Un-American Activities is an express mandate to classify doctrines as false ("un-American") and dangerous ("subversive"). It thus on its face negates the basic purpose of the First Amendment, which, as we have seen, withdraws from governmental bodies the power to declare that there are certain ideas which the people cannot be trusted to hear and to judge for themselves.

The question here is not whether Congress can investigate speech, it is whether it can determine and punish that certain doctrines are officially regarded as dangerous. The First Amendment prohibits any governmental determination of religious heresy. *United States v. Ballard,* 322 U. S. 78; *Cantwell v. Connecticut,* 310 U. S. 296. By the same token (*Prince v. Massachusetts,* 321 U. S. 158, 164), it must prohibit governmental determination of political or economic heresy, and this must be true even if the

search for heresy is conducted in the alleged interests of the security of the state. The First Amendment prohibits such trials as that of Socrates, who was condemned, after a trial with full Athenian due process, of propagating doctrine which corrupted the youth.

Nor can the Committee be sustained on any theory that its classification of ideas, though invidious, is merely academic because it cannot impose a direct sentence like that which was meted to Socrates. Nothing is clearer than that the Committee's inquiry into speech necessarily, under its frame of reference, restricts speech. "That the Committee's investigation does in fact restrict speech is too clear for dispute. The prosecution does not deny it and the court concedes it." Edgerton, J., dissenting in *Barsky v. United States, supra,* at 255.

The fact is that the Committee on Un-American Activities is so effective that it not merely restrains speech, it threatens to destroy freedom of speech (and thus self-government) altogether. Through its untiring efforts, the Committee has made incalculable inroads on the democratic process. "The effect," says Justice Edgerton (dissenting in *Barsky's* case, *supra,* at 255), "is not limited to the people whom the Committee stigmatizes or calls before it, but extends to others who hold similar views and to still others who might be disposed to adopt them. It is not prudent to hold views or to join groups that the Committee has condemned. People have grown wary of expressing any unorthodox opinions. No one can measure the inroad the Committee has made in the American sense of freedom to think. There has been some suggestion that it restrains only timid people. I think it nearer the truth to say that, among the more articulate, it affects in one degree or another all but the very courageous, the very orthodox, and the very secure." Thus the Committee's Hollywood hearings have intimidated workers in an entire industry, and have had a stultifying effect on the product

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they offer to the public. See Ross, *Come In Lassie!*, The New Yorker, Feb. 21, 1948, p. 32.

To the Committee can be traced directly or indirectly, as a result of its pressures or in imitation of its successes, virtually all manifestations of the growing tendency of suppression of civil liberties. It is the Committee which is entitled to most of the credit for the rash of federal and state "loyalty" orders, official proscriptions of organizations, political deportations, political prosecutions, imprisonment for refusal to answer questions relating to political opinions and beliefs, police interference with political meetings, and inquisitions by state "little un-American" committees.

It is preposterous to say that a Committee which has so curtailed freedom of speech and assembly is consistent with the First Amendment. If the First Amendment permits inroads of such an extent into this freedom, it has no vitality and might as well not exist at all. The First Amendment serves little purpose if it can only strike down relatively insignificant legislative aberrations like compulsory flag salutes while leaving intact so pervasive and purposive a censorship as that imposed by the Committee on Un-American Activities. The Committee and freedom of speech are mutually exclusive, and the First Amendment cannot survive if the Committee can. See Emerson and Helfield, *op. cit.*, 8-14, 20-26.

As we have seen, it is not disputed that the Committee's inquiries restrict speech. And it is apparent that this restriction flows not merely from the irresponsible practices of the Committee, but from the fact that its charter requires it to classify doctrines as dangerous and false on the basis of the subjective prejudices and personal interests of the Committee members. Under orthodox analysis, legislation which restricts speech is invalid unless saved by the "clear and present danger" doctrine. For present purposes, it is unnecessary to discuss whether the "clear and present danger" exception applies to discussions of public issues, the field in which the Committee operates, although

we think it clear that it does not. *Cf.* Meiklejohn, *op. cit., passim.* This is because the Committee's authority is neither limited by, nor directed to, any such concept. Under the wholly illusory standards of its charter, the Committee, as we have seen, may and does inquire into, *i. e.*, restrict, whatever speech and assembly it chooses.

Nor can the Committee be saved by any judicial construction narrowing its jurisdiction or because some of its inquiries may be within the Congressional power. A statute may not be saved by narrowing construction if on its face it permits interference with the freedoms guaranteed by the First Amendment, for the mere existence of such a statute is itself a restraint on speech. *Thornhill v. Alabama, supra; Winters v. New York,* 333 U. S. 507; *Stromberg v. California,* 283 U. S. 359, 369; *Herndon v. Lowry,* 301 U. S. 242, 258. Furthermore, a narrowing construction would be contrary to the legislative purpose to give the Committee a boundless discretion and would be completely at variance with the Committee's operations and activities. The legislation contains no ascertainable standards to which the Committee may be confined. Hence an attempted saving construction would be outright judicial legislation. *United States v. Reese,* 92 U. S. 214, 221.

Finally, just as the convictions set aside in the *Thornhill* and *Stromberg* cases could, for all the records showed, have been based on a full application of a statute which on its face was unconstitutional, so here, for all the record shows, the subpoena which was served on petitioner could have been issued under a plenary, and therefore invalid, construction of the Committee's authority. There is nothing here from which it may be supposed that the Committee was acting within narrower limits than appear on the face of its charter.

The decisions which have sustained the Committee, *Barsky v. United States,* 167 F. (2d) 241, and *United States v. Josephson,* 165 F. (2d) 82, are alike in their reasoning.

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In both cases, the majority ruled that Congress has power to inquire into threats to the national security ("threats to the existing form of government by extra-constitutional processes of change," *Barsky's* case at 246; "the seeds of revolution," "matters which potentially affect the very survival of our Government," *Josephson's* case at 88, 89). In both cases, the majority conceived that the First Amendment is not involved because it would be applicable only to legislation which might result from the inquiry, the nature of which is speculative. Thus, said the court in *Barsky's* case, at 246, the cases on the First Amendment and the clear and present danger rule "dealt with statutes which actually imposed a restriction upon speech or publication." (But, at 250, "We assume, without deciding, for purposes of this case, that compulsion to answer the question asked by the Congressional Committee would impinge upon speech and not merely invade privacy.")

The errors in this reasoning are obvious.

First, the power of Congress to inquire into threats to our security is not involved. As we have seen, the Committee's authority is not channelled into any such direction. It can and does investigate any propaganda it pleases. If Congress had wished to investigate propaganda which seeks to instigate revolution, it could have drafted an authorization in terms apt for that purpose.

The *Josephson* and *Barsky* courts have apparently succumbed to the Committee's own untrue propaganda, assisted by the reference to "activities" in its title and by such extra-jurisdictional inquiries as its spy hunts, that it is preserving the country from violent revolution. Even if this were true, which it is not, such an activity would be beyond its written authority. Contrary to a popular misconception, the Committee has no jurisdiction to investigate acts of espionage, sabotage, treason and terrorism, or conspiracies to overthrow the government by violence.

Secondly, assuming that Congress has the power to inquire into threats to our security, the First Amendment prohibits it from exercising that power in such a way as to abridge freedom of speech and assembly. This obvious point both the *Barsky* and *Josephson* decisions miss by assuming that the First Amendment applies (or, perhaps, applies in full force) only to the legislation, if any, which is enacted following the inquiry, and not as well to the exercise of the inquiry power itself. The reason why the Committee is unconstitutional under the First Amendment, however, has nothing to do with any legislation other than that which empowers the Committee. It is this latter legislation which is invalid because it constitutes a use of the power of inquiry to abridge freedom of speech and assembly. We have seen that the Committee's inquiry authority in fact censors expression, and that this censorship flows inevitably from the vagueness of its standards and the circumstance that they presuppose a classification of doctrines as dangerous and false.

The key point missed by the *Josephson* and *Barsky* cases —that the First Amendment limits the power of inquiry itself — hardly needs demonstration. The First Amendments limits *all* the powers of Congress. The grant of inquiry authority to the Committee is itself a legislative act subject to constitutional restrictions, as much so as legislation passed as a result of the inquiry. "The First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except tax laws." Stone, J., in *Jones v. Opelika*, 316 U. S. 584, 609 (dissent, adopted as majority view in 319 U. S. 103). It cannot be assumed that the power of inquiry, an implied power which is ancillary to the exercise of the powers expressly delegated to Congress, has an immunity from the First Amendment that is not enjoyed by the expressly delegated powers themselves.

The reason why the majority in both cases missed this point apparently stems from a misconception that the First

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Amendment applies only to legislation which directly interdicts speech. Such is the explanation for the assertion in *Barsky's* case, already quoted, that the First Amendment cases "dealt with statutes which actually imposed a restriction upon speech or publication" and for the assertion in *Josephson's* case (at 92) that the Constitution only protects freedom of speech from "legal process."

The fact is, however, that the First Amendment prohibits *any* legislative restraint of speech and assembly (subject to the possible clear and present danger exception), whether it is a direct interdiction or a less direct or disguised restriction. *Cf. Grosjean v. American Press Co.*, 297 U. S. 233; *Murdock v. Pennsylvania*, 319 U. S. 105; *Jones v. Opelika*, 319 U. S. 103, adopting dissents in 316 U. S. 584, 601, 610, 622; *Busey v. District of Columbia*, 319 U. S. 579; see discussion of Edgerton, J., dissenting in *Barsky's* case, at 252-255. Thus a compulsory oath of allegiance is invalid because it restricts expression although it does not directly forbid it. *W. Va. Bd. of Education v. Barnette, supra.* Similarly, in *Thomas v. Collins, supra*, a bare requirement that one must register before speaking was held incompatible with the First Amendment. This Court has recognized that withdrawal of second-class mailing privileges may abridge freedom of the press. See *Hannegan v. Esquire*, 327 U. S. 146. And a state prohibition of teaching of a foreign language to a child is an invalid interference with both the teacher's and the child's rights of expression. *Meyer v. Nebraska*, 262 U. S. 390. Indeed, if the First Amendment applies only to legislation which expressly forbids speech, and not also to legislation which otherwise infringes expression, it affords little protection for so vital a right. "It is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the

whole within official control." Jackson, J., concurring in *Thomas v. Collins, supra,* at 547.

The *Josephson* and *Barsky* cases insinuate that the First Amendment, the prerequisite of free government, will endanger free government if applied to the inquiry power. This argument has consistently been urged as to application of the Amendment to all powers. The inquiry power is no more essential to the federal government than is the police power to state governments, and in any case there is no warrant to suppose that obedience to the First Amendment produces a weak government. "Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end." *W. Va. Board of Education v. Barnette, supra,* at 636, 637. To immunize any power from the First Amendment simply confesses a lack of faith *pro tanto* in the Amendment itself and permits an exception which may be used to destroy the rights it guarantees.

2. *The Fourth Amendment.*

The Committee is authorized to compel testimony in the course of its investigations. As we have seen, the scope of the Committee's investigations into speech is neither defined nor limited by its charter. It follows that its subpoena powers are likewise undefined and unlimited.

In this respect the Committee's subpoena powers violate the Fourth Amendment, since the constitutional prohibition of unreasonable searches and seizures condemns the avail-

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ability and use of process to compel testimony without adequate, foreknown standards for the inquiry. *Jones v. SEC*, 298 U. S. 1; *Re Pacific R. Comm.*, 12 Sawy, 559, 32 Fed. 241. *Cf. Ellis v. ICC*, 237 U. S. 434; *Kilbourn v. Thompson*, 103 U. S. 168, 196; *FTC v. American Tobacco Co.*, 264 U. S. 298, 305-307.

The Fourth Amendment prohibits "unlawful inquisitorial investigations," which were among the "intolerable abuses of the Star Chamber." *Jones v. SEC, supra*, at 28. "An investigation not based upon specified grounds is quite as objectionable as a search warrant not based upon specific statements of fact. Such an investigation, or such a search, is unlawful in its inception and cannot be made lawful by what it may bring, or by what it actually succeeds in bringing to light." *Id.* at 27.

The Committee's authority and conduct fall squarely within the condemnation voiced in the following passage from *Re Pacific R. Commission, supra*, at 263, which was quoted with approval in the *Jones* case (at 27):

> A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing where the practice under it would end.

The Committee has so used its subpoena powers that "no more extensive search into the hearts and minds of private citizens can be thought of or expected." Clark, J., dissenting in *United States v. Josephson, supra*, at 93. Its compulsion on witnesses to take oaths publicly as to their opinions and belief goes far beyond the compulsion to take an oath of allegiance which this Court struck down in *W. Va. Board of Education v. Barnette, supra.*

Congress, of course, has powers of investigation. In the case of the Committee, however, it has asserted the power to investigate opinions and expressions without limit. It infringes "the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men." Brandeis, J., dissenting in *Olmstead v. United States,* 277 U. S. 438, 478. In the *Sinclair* case, *supra,* the Court, in a case dealing with the Congressional inquiry powers, stated (at 292): "It has always been recognized in this country, and it is well to remember, that few, if any, of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs."

For these reasons, the Commitee's powers violate the Fourth Amendment as well as the First.

3. *The Fifth and Sixth Amendments.*

The Committee's "exposures," as we have seen, punish the persons and organizations "exposed" by subjecting them to the sanctions of a hostile public sentiment. This punishment is imposed on those who have, in the Committee's opinion, violated its code of censorship.

The Committee's authority thus violates the Fifth and Sixth Amendments since it permits punishment without the requirements of procedural due process, such as a fair hearing and adequate opportunity for self defense. Nor is the Committee saved by the circumstance that the punishment which it imposes is not incorporated in formal judgments and that its nature and degree is not directly set by the Committee itself. On the contrary, further violations of due process arise out of these very respects, for it is obvious that due process requires some regularity in the processes of conviction and sentencing. If the Committee throws one of its victims to the lions it can hardly escape

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responsibility on the ground that (1) it was in too great haste to impose a formal sentence of death by lions, and (2) besides the damage was done by the lions and not by the Committee.

Furthermore, the Committee's punishment is imposed for violation of a censorship code which is not published and is incapable of advance determination. The Committee's authority thus violates due process by permitting punishment on charges not made (*Cf. Cole v. Arkansas,* 333 U. S. 196; *DeJonge v. Oregon,* 299 U. S. 353, 362) and for conduct not proscribed in advance by adequate standards of guilt. *Connally v. General Construction Co.,* 269 U. S. 385; *Lanzetta v. New Jersey,* 306 U. S. 451; *Winters v. New York, supra; Pierce v. United States,* 314 U. S. 306, 311.

Finally, the contempt statute itself cannot be constitutionally applied to punish the withholding of testimony from the Committee. A witness "may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry." *McGrain v. Daugherty,* 273 U. S. 135, 176. Since the statute punishes the withholding of only pertinent testimony, *Sinclair v. United States, supra,* there must be some standard to determine what is and what is not pertinent to the scope of the Committee's inquiry. *Cf. M. Kraus & Bros. v. United States,* 327 U. S. 614, which held that a statute penalizing a violation of an indefinite regulation cannot be constitutionally applied. As we have shown above, the statute establishing the Committee is without standards, and the scope of the Committee's inquiry into propaganda is determined only by the personal prejudices of the members of the Committee. This standard of the personal prejudices of members of the Committee — or rather this lack of standard — obviously does not satisfy the requirement of the Fifth Amendment that a penal statute furnish adequate standards for the guidance of those whose conduct it governs. See cases cited *supra.* Since no one can fairly say, because of the vagueness of the Committee's authority,

what is or is not pertinent to the Committee's jurisdiction, the criminal penalty cannot be validly applied to punish resistance to an assertion of that jurisdiction.

4. *The Ninth and Tenth Amendments.*

Congress has only the powers delegated to it by the Constitution, and the inquiry power is implied only to assist its execution of its delegated powers. *Kilbourn v. Thompson, supra; McGrain v. Daugherty, supra; Jurney v. MacCracken, supra.* Contempt of Congress is punishable only for obstruction of a legislative function. *Marshall v. Gordon,* 243 U. S. 521.

The Committee's inquiry authority, however, is unlimited, and thus goes beyond the scope of the delegated powers. As we have already seen (this part, *supra,* B. 2(a) and (b)), it is acknowledged that the Committee's inquiries are designed to go beyond any power of substantive legislation. Furthermore, no delegated power exists for censorship of opinion and expression distasteful to the legislature. Accordingly, the Committee's authority contravenes the Ninth and Tenth Amendments.

II. The Judgment Below Must Be Reversed Because of an Absence of Proof That Petitioner Was Summoned to Testify on Matters of Inquiry Committed to the Committee and Because of the Exclusion of Evidence That the Committee Was Acting Improperly and Beyond Its Authority.

The indictment alleges that the petitioner was "summoned as a witness . . . to give testimony before the . . . Committee . . . *upon matters of inquiry committed to said Commitee by Public Law No. 601, Section 121, and aforesaid Resolution 5,* . . . and was directed to be sworn to testify *on said matters.* . . ." (R. 215, emphasis supplied).

At the trial, no evidence whatever was introduced in sup-

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port of the italicized phraseology. As Justice Prettyman stated in his dissent below (R. 244, 170 F. (2d) at 284):

> This record does not show, and we do not yet know, what it was that the Committee wanted appellant to testify about. The subpoena merely directed the marshal to summon him 'to testify touching matters of inquiry committed to said Committee'; it did not describe or name any such matter. He was not told by anybody, so far as the record shows, what the matters were concerning which he was to testify. There is no shred of evidence that he was summoned as a witness upon a matter under inquiry before the Committee, but the statute requires that he must have been summoned upon such a matter.

The prosecution, thus, failed to prove any facts from which it could be concluded:

(1) That the inquiry in connection with which the Committee summoned the appellant was within the scope of the authority assigned to it by Congress. For all the record shows, the Committee might have been wishing to inquire into the habits of bees or some other subject equally remote from the dissemination of propaganda, whether "American" or "un-American."

(2) That the inquiry was within the scope of the powers of Congress.

(3) That there was any matter at all under inquiry before the Committee.

The record reveals not only a failure on the part of the prosecution to prove these points but also that the petitioner was not permitted to prove their negatives — *i.e.*, that the Committee was acting beyond its authority and the authority of Congress and that it had no matter under inquiry. Prior to trial the petitioner moved for a bill of particulars "setting forth in detail the specific matters concerning which the defendant was summoned to give testimony before the Committee" (R. 221). This motion was denied (*ibid.*). At the trial the court refused to permit the

defense to prove that the Committee had not summoned the petitioner in order to elicit any information in a matter of inquiry committed to it by Congress or in the exercise of any power given to it by Congress, but rather to harass and punish him for his political beliefs and to prevent his departure from the United States and his return to Germany (R. 68-71, 79, 80, 88-90, 100-102, 104, 105, 119-120). The trial court's position in excluding this offer of proof was, "I have to assume, and I shall assume, that the Committee was making an investigation for proper purposes within the power of Congress" (R. 120). This proof having been offered and excluded, it must, for present purposes, be regarded as established.[5]

Under established principles and authorities, it is clear that the trial court erred in denying judgment of acquittal for the lack of proof as to the subject-matter of the Committee's inquiry, if any, and in excluding the proffered evidence. Hence the court below erred in affirming the conviction.

The recitation in the indictment that the petitioner was summoned to testify on matters of inquiry committed to the Committee was an essential allegation under the statute and the Constitution. It therefore had to be proved. In *Sinclair v. United States, supra,* involving a prosecution under the same statute, the Supreme Court expressly recognized the need for pleading and proving that the testimony

[5] We think it appropriate to point out that a majority of the Committee membership revealed its intentions regarding the petitioner in statements made on the House floor on the resolution, proposed by the Committee, to cite petitioner for contempt. See 93 Cong. Rec. 1177-1180 (Rep. Nixon), 1181-1182 (Rep. Rankin), 1182-1184 (Rep. Bonner), 1184-1186 (Rep. Mundt), 1186-1187 (Rep. Vail), cited at R. 105. These representatives did not complain to Congress that petitioner had frustrated an attempt by their Committee to get information, but suggested that his alleged default furnished a good excuse to punish a person whom the Committee dislikes. Thus Mr. Nixon stated (at 1180): "The resolution [to cite petitioner for contempt] before the House today proposes a very simple and direct question. By adopting the report of our committee concerning an obvious contempt, this House can put Mr. Eisler out of circulation for a sufficient period of time for the Department of Justice to proceed against him on more serious charges."

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sought was pertinent to an authorized inquiry of the Congressional Committee. The Court stated (at 296, 297):

> Appellant earnestly maintains that the question was not shown to be pertinent to any inquiry the committee was authorized to make. The United States suggests that the presumption of regularity is sufficient without proof. But, without determining whether that presumption is applicable to such a matter, it is enough to say that the stronger presumption of innocence attended the accused at the trial. It was therefore incumbent upon the United States to plead and show that the question pertained to some matter under investigation.

It is apparent that if, as the courts below ruled, the prosecution need not prove that the inquiry was within the authority of the Committee and the Congress, and the defense may not prove the contrary, then there is no longer any force in the long-established doctrine of this Court that judicial review is available to protect individuals from unwarranted and unconstitutional legislative inquisition. See *supra*, p. 9; *Kilbourn v. Thompson, supra; In re Chapman, supra; McGrain v. Daugherty, supra; Jurney v. MacCracken, supra.* The establishment by the trial court of an irrebutable presumption that the Committee was acting properly and within the powers of Congress finally gives realization to the apprehensions which Justice Brandeis and proponents of the contempt statute thought necessary to quiet. Thus Senator Bayard, answering those who opposed the bill as dangerous to the rights of the people, said in the debates on passage of the legislation (Cong. Globe, 34th Cong., 3d Sess., pp. 439, 440, Jan. 23, 1857):

> I am aware that legislative bodies have transcended their powers — that under the influence of passion and political excitement they have very often invaded the rights of individuals, and may have invaded the rights of coordinate branches of the Government; but if our institutions are to last, there can be no greater safeguard than will result from transferring that which now stands on an indefinite power (the punishment as

well as the offense resting in the breast of either House) from Congress to the courts of justice. *When a case of this kind comes before a court, will not the first inquiry be, have Congress jurisdiction of the subject matter? — has the House which undertakes to inquire, jurisdiction of the subject? If they have not, the whole proceedings are coram non judice and void, and the party cannot be held liable under indictment.* The court would quash the indictment if this fact appeared on its face; and if it appeared on the trial, they would direct the jury to acquit. [Emphasis supplied.]

The courts below also overruled, by their presumption, the principle that contempt of Congress is constitutionally punishable only for acts which "obstruct the performance of the duties of the legislature." *Jurney v. MacCracken, supra,* at 148; *cf. Marshall v. Gordon, supra.*

This denial of the right of judicial review to one brought into Court on a charge of contempt repudiates our constitutional form of government. There is no reason for a doctrine that actions of Congressional committees are not subject to check in accordance with the Constitution and statutes to the same extent as are actions of officials of the executive department or the judiciary. There is no reason why actions of legislative committees are entitled to a greater deference or to a greater immunity from constitutional limitations than statutes passed by the entire legislature. And it is a dangerous infringement of the bill of rights to prevent a challenge of Committee action as contrary to the bill of rights.

The majority opinion below wholly ignored the circumstance that there was no proof of the subject-matter of the inquiry, if any, although this issue was briefed and argued before the court and is treated in Justice Prettyman's dissent. The majority opinion does, however, devote a paragraph (R. 237, 170 F. (2d) at 278, 279) to the exclusion of the proffered proof regarding the purpose of the Committee's summons. This paragraph first chides defense coun-

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sel for attempting to "becloud the real issue in the case" by offering this proof. It then gives an abbreviated and garbled version of what was offered, even omitting the fact that the offer expressly included proof that the summons was for no purpose "within the scope of the Committee's power" and was "not to elicit any information upon a matter under inquiry committed to them by Congress" (R. 102). It then concludes (emphasis supplied): "The lower court properly refused to admit such evidence, on the ground that the court had no authority to scrutinize the *motives* of Congress or one of its committees."

It is abundantly clear that the defense was seeking to prove at trial that the Committee had no legislative purpose in summoning the petitioner, was discharging no legislative function, and was seeking to punish him for his political beliefs. This proof was relevant to the validity of the summons, it was relevant under the indictment and the contempt statute, and it raised obvious constitutional and statutory defenses. The appellate court's dismissal of these issues as going to the *motives* of Congress is without substance. Of course the motives of a Congressional committee in making an inquiry having a legislative purpose and function are not subject to judicial scrutiny. But it is utterly cavalier to dismiss a contention that the Committee was not exercising a legislative purpose and function by labelling it as an attack on "motives."

The conviction of the petitioner was, therefore, erroneous under the statute and the indictment, and was also a denial of due process, of his right under the Fourth Amendment to be free from unlawful inquisition, of his right to freedom of thought under the First Amendment, and of his right to freedom from the impact of unauthorized federal power under the Ninth and Tenth Amendments.

III. The Petitioner Can Not Be Punished for Withholdholding Testimony from the Committee Under the Circumstances of His Appearance as Shown by the Record and Offered to Be Proved.

As set out in our statement of facts, the petitioner, upon being served with the Committee's summons, prepared to appear at the hearing in Washington on February 6, 1947 (R. 122, 110, 111). On February 4, 1947, however, he was arrested as an "enemy alien" by officers of the Immigration and Naturalization Service, held in custody for two nights, taken in custody to the hearing, and there held in custody (R. 80, 81, 82, 83, 85, 123, 125, 13, 30). For present purposes, there must be taken as proven the evidence offered by petitioner and excluded by the trial court — *i.e.*, that the arrest was instigated by the Committee to punish him for his political beliefs (R. 79, 80, 88, 89, 100), and that the arrest was illegal in that (a) the petitioner was, as the Department of Justice knew, an Austrian national and hence not an enemy alien (*United States ex rel. Schwartzkopf v. Uhl*, 137 F. (2d) 898); (b) the arresting officers neither had nor exhibited a warrant of arrest; and (c) the government had earlier discontinued the arrest and internment of enemy aliens.

The transcript of the hearing before the Committee shows that the petitioner stated to the Committee at least three times (R. 44, 46, 47) that he would take the oath and testify if he were first allowed three minutes in which to make a few remarks. For present purposes there must also be taken as established the offered proof, excluded by the trial court, that the petitioner wanted to utilize the three minutes to make an objection to his being arrested and being compelled to take the oath and testify.[6]

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[6] The proof offered included evidence of the contents of the intended three-minute statement (R. 133, 134, 135, 138, 139), testimony that petitioner's counsel had advised him that petitioner, and only petitioner, had a right to make objections to the Committee (R. 122, 126, 133, 146, 149, 150), testimony that petitioner believed he had basis for objection (R. 119, 120), and testimony that he would have taken the oath and testified after he had made his objections (R. 135).

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Under the circumstances of his production before the Committee, the petitioner, we submit, had a Constitutional right to refuse to testify at that time, and certainly he had a Constitutional right to insist on making an objection before testifying. The Committee's action in causing the illegal arrest of the petitioner and in having him brought before it publicly in humiliating custody was as much subject to the bill of rights as any other legislative act. This action clearly deprived the petitioner of his liberty without due process of law. To subject him to inquisition under such ignominious circumstances was a deprivation of his rights under the Fourth Amendment. The courts, we suggest, should not lend themselves to the furthering of so palpable an abuse of process. A witness who is unlawfully arrested and hauled before a committee does not voluntarily appear and cannot be punished for contempt for refusing to testify. *United States v. Dolsen*, D. C. Dist. of Col., Criminal No. 65801, decided June 20, 1946, also involving illegal conduct of the Committee on Un-American Activities.

The bill of rights incorporates "those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses" and condemns actions which fall short "of conforming to fundamental standards of procedure." *Adamson v. California*, 332 U. S. 46, 67, 68 (Mr. Justice Frankfurter concurring), 124 (Mr. Justice Murphy, dissenting). Under all canons of decency and fair procedure, the petitioner was entitled to resist an outrageous deprivation of his liberties and to refuse to cooperate with his persecutors. At the very least, he was entitled to voice his protest before cooperating with them. The petitioner failed to testify solely because of the Committee's illegal and arbitrary conduct, and it offends the Fifth Amendment to permit the Committee to exact the performance of duties from one whom it had illegally deprived of his rights. *Cf. Klapprott v. United States*, ...

U. S. .... (Jan. 17, 1949). When the petitioner stated, in his colloquy at the Committee hearing with Mr. J. Parnell Thomas, that he was a political prisoner (R. 44, 46), he was factually correct, and when he asserted that "a political prisoner has to do nothing" (R. 47), he was legally correct.

The bald upshot of this case is that the petitioner has been sentenced to imprisonment for one year because he insisted on an opportunity to make a three-minute objection to his illegal and ignominious treatment. We think that the petitioner had a constitutional right to make this objection. See *Townsend v. United States*, 95 F. (2d) 352, 361. But even if he had no such right, he cannot be punished for insisting on making a three-minute objection, especially when he offered to answer questions if allowed to make the objection. This insistence did not "obstruct the performance of the duties of the legislature" and hence may not be constitutionally punished as contempt. *Jurney v. MacCracken, supra,* at 148; *cf. Marshall v. Gordon, supra.* The conviction of the prisoner is punishment for nothing more than lèse majesté of the Committee. We had supposed that the offense of lèse majesté was a feudalistic crime not suitable to a democratic society. The decision below teaches the contrary.

Aside from these constitutional objections, it is clear that, taking the offers of proof as established, the petitioner was not guilty of the offense charged under the statute. The petitioner was indicted for a wilful default of the Committee's summons. An attempt to make a three-minute legal objection to being sworn is, we insist, not a default, and certainly not a wilful default. This is particularly true, in light of Chairman Thomas' reluctant admission that it was a recognized and proper procedure for a person appearing at a Committee hearing to make legal objections *before* complying with the request objected to (R. 49). The petitioner certainly cannot be held to have defaulted in a duty to the Committee if all he tried to do was to conform

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to the practice recognized by the Committee itself as proper.

On the point, Justice Prettyman's dissent is particularly illuminating (R. 244, 170 F. (2d) at 284):

> The Chairman of the Committee evaded answering the questions of defense counsel as to the procedure which the Committee had established in respect to the notation of legal objections, but the plain inference of his testimony is that the established procedure was to allow a witness to make his legal objections before being sworn. The purport of appellant's offer of proof was that he had intended to interpose legal objections to being compelled to testify. That proffer must be viewed in the setting of the Committee hearing. The testimony of the Committee Chairman was that the Committee room was "jammed packed with people," and the chief investigator of the Committee testified that there were quite a few photographers present taking photographs. The entire colloquy, which takes a little less than two pages of print, could hardly have taken more than a few minutes. It is true that appellant did state that he was not going to take the stand and refused to be sworn, but he said twice, "I am ready to answer all questions," and twice he said, "I do not refuse to be sworn." Twice he said that he wanted to speak before he was sworn, and twice he quite definitely said that he wanted only three minutes.
>
> If it was the established practice that legal objections be stated by the witness before he was sworn, and if appellant could prove that all he wanted to do was to state his legal objections and thereafter be sworn and "answer all questions", I do not see how he could be held guilty of "willful" default. While bad faith is not an element of willfulness, intent is. Appellant was entitled to prove that he had no intent to refuse to testify but merely wanted to follow the established practice.
>
> The trial court made some reference to appellant's position being that he wished to impose conditions upon his testifying, but I see no merit in that suggestion, if, as a matter of fact, appellant was merely attempting to comply with the established procedure.

It follows from the above that the trial court erred in not permitting the petitioner to prove what he intended to say to the Committee when he asked for three minutes before being sworn (see footnote 6, *supra*) and in denying petitioner's request for charges that the jury must acquit if it found that he had merely attempted to make legal objections to being sworn and to being required to testify (R. 180, requests 19, 20). The evidence offered was relevant to the issue before the jury as to whether petitioner had committed the wilful default charged. It was also error to exclude the proof offered as to the illegal and improper circumstances of the arrest and production of the petitioner. Finally, the conviction of the petitioner in a trial in which he was not allowed to prove these points violates the due process of the Fifth Amendment and the First, Sixth, Ninth and Tenth Amendments.

The majority below agreed (R. 238, 170 F. (2d) at 279, 280) that it was "customary procedure to allow witnesses to state legal objections to the jurisdiction of the Committee before they were required to be sworn." It obviously follows that, contrary to the rulings of the trial court, the jury should then have been allowed to hear evidence on the issue of whether the petitioner was merely attempting to conform to this procedure, and to determine this question of fact under appropriate instructions. The majority below, however, ignored the trial court's errors in this respect. Instead, the majority asserted that the petitioner, despite his repeated reference to "three minutes," "conveyed [to the Committee] the impression he would consume much more" time (R. 238, 170 F. (2d) at 280). The majority also found, completely ignoring the offered and excluded proofs (footnote 6, *supra*), that appellant's request was only "for time to make preliminary remarks" other than objections (R. 238, 239, 170 F. (2d) at 280) and that "his refusal to be sworn effectively constituted a refusal to give testimony except upon conditions which he was not entitled to interpose" (R. 239, 170 F. (2d) at

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280). The majority below, therefore, made the same error as the trial court (see *infra*, p. 85) in itself finding, rather than in allowing the jury to find, the crucial issue of fact. It thus usurped the constitutional function of a jury. *Cf. Weiler v. United States*, 323 U. S. 606, 611; *Bollenbach v. United States*, 326 U. S. 607, 614.

IV. The Conviction Should Be Reversed for Failure of the Trial Judge to Disqualify Himself Following the Filing of Petitioner's Affidavit of Bias and Prejudice.

A. The affidavit was substantively sufficient.

Shortly summarized, the affidavit of bias and prejudice makes the following points: (1) As legal adviser to the F. B. I., Justice Holtzoff participated in investigations of aliens and Communists, including a specific F. B. I. investigation of the appellant (an alien and a Communist) which resulted in a report that he is a foreign agent. (2) Justice Holtzoff has a personal hatred of Communists, as shown by his sponsorship of a bill for the deportation of alien Communists and their incarceration in concentration camps and by his admiration for and close friendship with J. Edgar Hoover.

The trial court should have disqualified himself upon the filing of the affidavit, in view of the Act of March 3, 1911, c. 231, sec. 21 (36 Stat. 1090, formerly sec. 21 of Judicial Code, 28 U. S. C. sec. 25, now, slightly revised, 28 U. S. C. sec. 144).

The allegations made in an affidavit of bias and prejudice may not be reviewed for truth or falsity either by the judge against whom the affidavit is addressed or on appeal. On the contrary, the simple issue is whether the allegations "give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *Berger v. United States*, 255 U. S. 22, 33, 34. "The question in all such cases is whether the affidavit asserts facts from which

a sane and reasonable mind might fairly infer personal bias or prejudice on the part of the judge." *Hurd v. Letts*, 80 App. D. C. 233, 234, 152 F. (2d) 121, 122. This rule conforms to the Congressional solicitude, remarked in the *Berger* case (255 U. S. at 35, 36), that "the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial." *Cf. Whitaker v. McLean*, 73 App. D. C. 259, 118 F. (2d) 596.

It is apparent that the affidavit amply satisfies the substantive requirement described and that the policy of the statute required disqualification following its filing. It can be inferred from the affidavit's allegations that Justice Holtzoff was predisposed against the appellant, since an investigator may reasonably be supposed to entertain a prejudice against one whom he has investigated and found guilty of reprehensible conduct. It can not promote public confidence in the judiciary for an investigator to sit in judgment on the person he investigated. By the same token, it is offensive to the policy of the statute for one who has an extreme personal hatred of Communists to judge a Communist. Hatred, like other emotional attitudes, is itself susceptible of proof only by inference, and in this case the inference is fairly supported. One who proposes to deport and incarcerate alien Communists and who admires, supports, cooperates and is friendly with, an official who describes Communists by intemperate, unofficial epithets, may reasonably be supposed to have exhibited a "bent of mind" with respect to Communists.

In *Barsky v. Holtzoff*, U. S. App. D. C., April Term 1947, Misc. 126, decided June 11, 1947, rehearing denied, June 12, 1947, the court issued a writ of prohibition compelling Justice Holtzoff to disqualify himself in a prosecution under the same contempt-of-Congress statute. The circumstances recited in Barsky's affidavit with regards to Justice Holtzoff's participation in F. B. I. investigations were the same as alleged by petitioner, except that a different organiza-

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tion is involved. The identity of the Eisler and Barsky affidavits on this point was recognized by Justice Holtzoff himself. The Barsky affidavit had been filed after the appellant's affidavit and was stricken by Justice Holtzoff following the same action in the appellant's case. In ruling on the *Barsky* case, Justice Holtzoff stated:

> I refer to my memorandum in the case of United States v. Eisler, in which a similar affidavit was filed, and which I overruled for the same reasons. In my memorandum in that case, I expounded at considerable length the principles to which I have just referred, and stated authorities. I will consider my memorandum in that case incorporated as part of my ruling in this case.

The Court of Appeals had made the Barsky writ absolute by the time this appellant's motion for a new trial was argued. In adhering to his earlier ruling, Justice Holtzoff distinguished the *Barsky* case not on any substantive ground but solely on the basis of asserted formal defects. These are subsequently considered herein.

It thus appears that the majority below refused to follow the ruling its court had made in the *Barsky* case only a few months earlier. The majority, however, did not see fit to mention or distinguish the *Barsky* decision, although the dissenting Justice considered it to be controlling (R. 242, 170 F. (2d) at 282).

The government has made some suggestion in its opposition to the granting of certiorari that the petitioner's affidavit was "argumentative" rather than factual with respect to the assertion of Justice Holtzoff's participation in investigations of the petitioner and others. This suggestion itself runs counter to the policy of the statute since it relies not on any fair reading of the affidavit, but rather on a hypertechnical construction. *Cf. Nations v. United States,* 14 F. (2d) 507, 509: "But we do not think that the affidavit need be so drawn as to fulfill the technical requirements of an indictment." It is apparent from the foregoing that

Justice Holtzoff himself understood that the import of the affidavit was that he had investigated the petitioner; otherwise, he would hardly have taken the trouble to deny the assertion (R. 207, 208). The majority in the Court of Appeals also so understood the affidavit, stating in its opinion (R. 237), "Appellant alleged, upon information and belief, that the judge had, in that prior capacity, directly assisted Federal Bureau of Investigation inquiries into the activities of aliens and Communists, including appellant." The dissenting judge had the same understanding, saying (R. 241), "In sum, the affidavit says that prior to his elevation to the bench the trial judge had been the active legal advisor to the investigator in the very investigation out of which this case arose, which investigation involved this appellant, among others."

Under the circumstances, it does not become the government to attempt to sustain the judgment below by advancing a strained interpretation which had never occurred either to the petitioner or to the two courts below.

While eliminating the embarassment of *Barsky's* precedent by simply ignoring it, the majority below ruled that the affidavit did not establish bias and prejudice "in the personal sense contemplated by the statute" (R. 237). It stated that "impersonal prejudice resulting from a judge's background or experience is not, in our opinion, within the purview of the statute" (*ibid.*). If this statement be taken to mean that prejudice which results from "background or experience" is *ipso facto* impersonal and thus not within the statute, it obviously repeals the statute; all prejudice results from "background or experience," not from heredity. If the statement means something else, it is on the one hand obscure and on the other deficient in explaining why the prejudice charged in this case was "impersonal." The use of the verbalistic formula of "personal" or "impersonal" supplies no guidance for decision. The correct test, in the light of the statutory policy, is whether one of ordi-

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nary conscience might well deem it unseemly for a judge to sit in view of the facts alleged in the affidavit. Justice Prettyman, therefore, reached the nub of the case in his dissent (R. 242): "Many able and conscientious lawyers and judges — and the trial judge here involved is certainly both — have a deep and abiding conviction of their own abilities to prosecute impersonally and to judge impersonally, and to do both in the same case. But such psychological detachment is not so well established that a belief to the contrary is unreasonable." *Cf.* sec. 5(c), Administrative Procedure Act, 5 U. S. C. §1004(c), which provides: "No officer, employee or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review. . . ."

The affidavit was also sufficient to require disqualification in its allegations regarding Justice Holtzoff's attitude toward Communists. The gist of these allegations is that Justice Holtzoff has a personal hatred of, and participated with Mr. Hoover in activities directed against, Communists. These were misconstrued by the trial court into a mere allegation that he is a friend of Mr. Hoover, who had made uncomplimentary references to Communists (R. 5).

In the *Berger* case, *supra,* the Supreme Court compelled the disqualification of Judge Landis in a trial of German and German-American defendants upon an affidavit alleging his personal hostility to Germans and German-Americans. The decision is thus controlling authority to require disqualification where, as is the case here, the affidavit of a Communist defendant demonstrates that the judge has a personal hatred of Communists.

A distinction is to be made, in this respect, between an aversion to Communism as a system and a hatred of those who advocate it. The allegations of the affidavit are to

the effect that Justice Holtzoff, like Mr. Hoover and the members of the Committee on Un-American Activities (none of whom could with any seemliness be permitted to sit in judgment on a Communist), has both attitudes.

B. The affidavit was timely.

The disqualification statute requires the affidavit to be filed ten days before the term of court unless good cause be shown for a failure to file within that time. Both the majority and dissenting Justice below agreed that the ten-day portion of this rule is impossible of application in the District of Columbia. The situation is described by Justice Prettyman in the following passage (R. 242, 170 F. (2d) at 283):

> The statute speaks of filing ten days before the term of court, but that provision was designed for district courts which have periodical terms and in which the identity of the trial judge is known well in advance. In this jurisdiction, the District Court consists of twelve judges who serve in rotation, or upon assignment, in the several branches of the court. The court is in continuous session, except for the summer. Thus, the name of the trial judge may not be known until shortly before the trial; as a matter of fact, several different methods of assigning criminal cases for trial have been experimented with in recent years. It is settled that in this jurisdiction the ten day provision of the statute is impractical in application and, instead, the rule of 'due diligence' must be applied. This is permissible under the clause of the statute which excepts from the ten-day requirement cases in which 'good cause shall be shown for the failure to file it within such time.'

As an addendum to Justice Prettyman's statement it should be noted that under the regular procedure in the District Court of the District of Columbia, there is no connection between assignment of hearing of motions before trial and assignment for trial. That is, the trial judge may or may not be the same judge who heard a motion in the case.

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The petitioner's counsel, some of whom were in New York City and others in Washington, first learned on May 20, 1947 that the trial of the case had been assigned to Justice Holtzoff. The affidavit of bias and prejudice was filed with the District Court on May 29, 1947. The reason for the interval was explained as follows in the affidavit (R. 225):

> I was first advised on or about May 20, 1947 by my counsel, who had just learned of the fact, that this case was to be tried before Justice Holtzoff. At that time I asked one of my counsel, Abraham J. Isserman, whether I was obliged to go on trial before a judge who had been connected with the F.B.I. and J. Edgar Hoover. He suggested that he would discuuss it with my other counsel in Washington, D. C. on May 23rd. I was subsequently advised that no conference on this question was held on that day because of the sudden death of Mr. Isserman's brother. Mr. Isserman was unavailable because of this bereavement, until May 27th, on which day my counsel conferred. They reported to me on May 28th after which I directed them to prepare this affidavit.

Both the trial court (R. 4) and the appellate court held that the affidavit was filed too late to require disqualification. This holding was erroneous and contrary to the policy of the statute. The lapse of time arose from the sudden death of the brother of the chief trial counsel and the dispersion of counsel and petitioner between two cities.

But even without these circumstances, a lapse of eight days between knowledge of the identity of the presiding judge and filing of the affidavit indicates no absence of diligence, particularly when the filing took place well before the trial date (June 4) and, in view of the availability of other judges, could not have been expected to delay the trial. The filing of such an affidavit is not to be taken lightly by any reputable lawyer. He too has a stake in the preservation of public confidence in our judicial system. He can be disciplined for contempt if his zeal in certifying

and filing the affidavit exceeds his discretion. *Cf. Laughlin v. United States,* 80 App. D. C. 101, 151 F. (2d) 281, cert. denied, 326 U.S. 777. If the affidavit is stricken, he must try his case, and perhaps future cases as well, before an estranged judge. When the client, therefore, suggests action for disqualification, the lawyer must consider the matter carefully. He must examine the client closely and seek independent verification of the client's assertions. Co-counsel must consult, even if they reside in different cities. The affidavit filed in this case shows on its face that research preceded its preparation; see, for example, the references therein to the Congressional Record, to hearings of the House Judiciary Committee, and to a House Report (R. 223, 224).

That it is proper for counsel to delay filing an affidavit of prejudice until he is sure of his ground has been recognized by the Eighth Circuit in *Morris v. United States,* 26 F. (2d) 444, which, in holding an affidavit to have been timely filed, regarded only the lapse of time after the hesitant attorney had received more convincing evidence of his client's assertions than had previously been at hand.

By imposing unreasonable conditions of time the holding not only frustrates the statutory policy to protect litigants from unfair trial and to preserve the reputation of the judiciary but also tends to cause an abuse of the statute. Justice Prettyman's dissenting opinion, we submit, states the rule which should have been followed (R. 243, 170 F. (2d) at 283):

> It seems to me that under the foregoing circumstances the filing of the affidavit nine days after the identity of the trial judge was ascertained came within 'due diligence'. There was an unforeseeable and unavoidable interruption during those nine days. The affidavit was filed six days before the trial, and other judges were available so that the trial would not have been delayed. Affiant could well have known that with twelve active judges on this District Court, no delay in trial would result from the disqualification of one

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> of them. Moreover, these affidavits should be prepared with the utmost care and certainty as to the facts. The courts should encourage careful consideration and deliberation on the part of counsel. It seems to me to be a grave mistake to hold that such affidavits must be filed almost instantaneously after the identity of the trial judge is ascertained. Such a rule will almost make mandatory the filing of the affidavit without deliberate and careful consideration of counsel. The rule ought to be that they be filed with the utmost deliberation consistent with the undelayed dispatch of the business of the court.

It is immaterial that motions to dismiss the indictment and for particulars were heard and denied by Justice Holtzoff on May 23, 1947 (R. 221). That date was a scant three days after Justice Holtzoff's assignment was learned of, and was the day on which the conference of petitioner's attorneys, scheduled to discuss filing the affidavit, was disrupted by the death of counsel's brother. Counsel could not fairly be expected to move for Justice Holtzoff's disqualification when there had been so inadequate an opportunity to examine the facts, the law, and the policy considerations. Furthermore, different considerations obviously apply as between the making of decision on a bare motion and the presiding at a trial before a jury. In *Barsky's* case, *supra,* the affidavit of bias and prejudice was not filed until after Justice Holtzoff had denied motions to dismiss the indictment; nevertheless, the District of Columbia Court of Appeals issued the writ of prohibition.

C. The affidavit was sufficient in form.

A comparison of the affidavit with the terms of the statute shows a scrupulous conformance to the formal requirements. However, one of the reasons assigned by Justice Holtzoff for striking the affidavit is an asserted defect in form in that the certificate of good faith was signed by Carol King, who, he stated, was not counsel of record for the defendant (R. 5), as required by the statute.

This assumption was palpably erroneous. Mrs. King was counsel of record beyond dispute, and the prosecution so stipulates (R. 229, 230). She was admitted *pro hac vice* by Mr. Chief Justice Laws at the arraignment (R. 215, 229). (Justice Holtzoff's statement in his opinion on the motion for new trial that he admitted Carol King pro hac vice (R. 206) is erroneous).

In the opinion on the motion for new trial, the trial court abandoned its error of fact and relied instead on the circumstance that Carol King is not a member of the District of Columbia bar (R. 206, 207).

To require that the certificate of good faith be signed by a counsel of record who is also a member of the local bar is a judicial amendment of the statute wholly unsupported by any statutory language, legislative history or court decisions.

D. The affiant's good faith could not be questioned.

As an additional ground for striking the affidavit, the trial court below stated that the affidavit was not filed in good faith (R. 4). In making such a finding, the court added still another requirement to the plain language of the statute. The statute requires that the affidavit be "accompanied by a certificate of counsel of record that such affidavit and application are made in good faith." This requirement of the statute, as we have shown above, was fully met. The statute does not permit the trial court to go beyond this requirement and to inquire as to whether the affiant did or did not have good faith. *Morris* v. *United States*, 26 F. (2d) 444.

To permit the trial court to go outside the affidavit in order to rebut the affiant's good faith, would be nothing more than an evasion of the doctrine of the *Berger* and *Barsky* cases, *supra*, that the trial court may not review the facts in the affidavit. The legislative requirement of a good faith certification by counsel was designed to elimi-

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nate this problem. In the *Berger* case, the Court said that to permit the judge charged with partiality to pass on the facts would simply perpetrate the very evil against which the statute is directed. The identical reasoning would forbid the trial court to go outside the affidavit and make findings as to the affiant's good faith. Indeed, the latter situation is more extreme. For how can the trial court rule on the affiant's motivation without a hearing? And in what manner can the affiant, if he wishes, dispute the findings of the court if they are based on facts outside the record?[7]

E. Conclusion.

We urge the Court to reaffirm the policy of the statute and the doctrine of the *Berger* case that the statute's "solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial" (at 35, 36). To the argument that to permit disqualification of judges upon the mere filing of affidavits would lead to abuses, the Court answered as follows (*Berger* case at 35):

> And in this there is no serious detriment to the administration of justice, nor inconvenience worthy of mention; for of what concern is it to a judge to preside in a particular case? of what concern to other parties to have him so preside?

There are twelve justices in the District Court for the District of Columbia. If Justice Holtzoff had excused himself another justice could have been assigned, the policy of the statute effectuated and no injury done to the administration of justice. The decision below is illustrative of a tendency in the lower courts to apply the statute

[7] In the present proceeding, the trial court referred to certain occurrences in chambers (R. 4, 206). Counsel's recollection of this incident does not conform with that stated by the court. We submit that the injection of such factual issues will not promote the policy of the statute or the administration of justice. Further, none of the facts recited by the court would appear to warrant its conclusion of bad faith.

narrowly and technically, thus nullifying its purpose as expounded in the *Berger* case, *supra*. See Frank, *Disqualification of Judges*, 56 Yale L. J. 605, 629. This Court should determine that this important statute, enacted to preserve respect for and confidence in the courts and to protect litigants from possibly biased judges, should receive a fair and liberal interpretation rather than the negative and grudging one applied in this case.

V. The Petitioner Did Not Receive a Fair Trial, and the Trial Court Virtually Directed a Verdict of Guilty.

The trial court's manifested hostility was so pervasive in nature that it cannot be fully appreciated without a review of the entire record. The following points up only some of the more glaring instances of bias. It is appropriate to note that the trial lasted only a few days. Thus the effect of the court's actions was not dissipated in the course of a long trial, nor does partial justification arise from possible weariness.

A. Prohibiting or allowing objections before the witness completed his answer.

The trial court made clear to defense counsel that a government witness, under cross-examination or otherwise, was to be allowed to finish his answer before any objection by defense counsel would be entertained.

Thus defense counsel was not permitted by the Court to object to the testimony of the witness although it was clear that the witness was speculating (R. 14, 15); that the witness had completed his answer but was about to add additional matter not called for by the question (R. 21); that the witness was addressing remarks to the Court instead of answering a simple question on cross-examination (R. 39); or that the witness' response was going far beyond the scope of the question (R. 42-47).

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In sharp contrast, the court did not apply its announced rule so as to prevent the prosecution from interrupting a witness' answer. Examples appear in the record at pages 99, 113, 122, 124. The following is illustrative (R. 122):

> Q. [By Mr. Isserman] Did counsel advise you as to these rights?
>
> A. [By the defendant] Yes, counsel advised me—
>
> Mr. Hitz: I am sorry, you have answered the question.
>
> The Court: Just answer yes or no.

Not only did the court permit Government counsel to interrupt a witness before his answer was complete, but the court, contrary to the rules laid down for defense counsel, itself on a number of occasions interrupted the defendant, when he was on the stand, before he had finished his answer, and prevented its completion (R. 114, 117, 129, 143).

The following examples are illustrative:

> Q. [By Mr. Isserman]: Mr. Thomas has testified at this trial, Mr. Eisler, that after you were asked to take the stand you said, 'I am not going to take the stand', and I ask you now whether you made that statement?
>
> A. [By the defendant]: Yes, it was the first part of the statement which I was not able to answer because I was interrupted.
>
> Q. What was the second part?
>
> A. I wanted to say—
>
> The Court: No, you have answered the question. (R. 129).

> Q. [By Mr. Isserman]: Did you have any other papers?
>
> A. [By the defendant]: Yes, I had a Mexican substitute passport, because I was invited—
>
> The Court: Just a minute, you have answered the question. (R. 114).

Thus the no-interruption rule was applied only to the defense and not to the prosecution or the court.

B. Reprimanding and harassing defense counsel.

(a) Defense counsel was cross examining Stripling, Chief Investigator of the House Committee on Un-American Activities, as to the hearing on February 6, 1947 at which Eisler committed the alleged contempt. Counsel was trying to show that Eisler actually took the witness chair, a point on which the witness had been evasive. The following took place (R. 33, 34, 35):

> Q. [By Mr. Isserman]: Isn't it true that Mr. Eisler sat down in the chair reserved for witnesses at the very beginning of the hearing?
> A. [By Mr. Stripling]: I don't recall that he did, no.
> Q. Well, do you have any recollection as to when Mr. Eisler took the witness stand?
> A. It is my recollection that he sat down when the Chairman made his preliminary remarks—while he was reading his preliminary remarks.
> Q. So that it was shortly after Mr. Eisler stated, according to your testimony, 'I am not going to take the stand,' that he actually sat down in the witness chair; isn't that true?
> A. I don't recall exactly whether he sat down or whether he stood.
> The Court: I think that is minutiae and is immaterial, because the charge against the defendant is that he declined to take the oath. What chair he was sitting in or whether he was seated or standing is, I think, immaterial. I suggest to counsel that the interrogation be directed to the charge in the indictment.
> Mr. Isserman: Well—
> The Court: Do not argue. I made a suggestion. Proceed to the next question.
> Mr. Isserman: I would like to have an answer to the question I just put.
> The Reporter (reading): 'Question: So that it was shortly after Mr. Eisler stated, according to your testimony, "I am not going to take the stand," that he actually sat down in the witness chair; isn't that true?'
> By the Court:
> Q. If you don't remember, say you don't remember.

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A. I don't remember.

By Mr. Isserman:

Q. Do you remember that he sat down in the chair at all, Mr. Stripling?

A. I am not positive whether he sat down or not.

Q. Just a few minutes ago you said Mr. Eisler walked over to the table and sat down in a chair reserved for witnesses. Now, did he or did he not do that?

The Court: You have the record; do not repeat the same question.

Mr. Isserman: That is not in the record. This is a matter outside the record.

The Court: I mean it is already in the record of what this witness testified this afternoon. You are repeating the same question.

Mr. Isserman: It is not clear to counsel. The witness has contradicted himself.

The Court: The question is in the record. Now, proceed to another question.

Mr. Isserman: I would like to resolve the contradiction by continuing questioning on this point.

The Court: Ask a specific question with a view to resolving the contradiction if you wish. You may do that.

This passage does not merely illustrate reprimands to counsel in which the court admonishes him not to "argue" and not to "repeat" what the court designates as "the same question." It illustrates, as well, the court's interference with cross examination. The court also by its reference to "minutiae" minimized the possible effect or value of cross-examination.

For a similar reference to "minutiae", see R. 84.

(b) When defense counsel moved to strike a remark made by the witness Thomas, the following occurred (R. 42):

Mr. Isserman: I ask that that remark be stricken as not being responsive.

The Court: It may be stricken. Just state your motion; do not argue.

Mr. Isserman: I have not argued; I just stated my ground.

(c) A few minutes later, the court again rebuked defense counsel. The following took place (R. 45-46):

Mr. Isserman: Have you read all the questions and answers which deal with Mr. Eisler's refusal to be sworn?

Mr. Thomas: Up to that point. I shall be glad to continue.

Mr. Isserman: Just a moment; you will get an opportunity to continue.

The Court: Do not argue with the witness.

Mr. Isserman: Well, the witness was remonstrating with counsel. I ask that he be admonished to answer the question.

The Court: I suggest to counsel that he proceed as counsel should.

Mr. Isserman: I wish to make objection to your Honor's remark and ask that it be stricken.

The Court: Motion denied. Counsel's function on cross-examination of a witness is solely to ask questions and not to remonstrate with the witness. Now, proceed and ask the next question.

If the court had not intervened—and there certainly was no occasion for it—the cross-examination would have proceeded without incident. But taking advantage of a triviality, the court managed to rebuke counsel twice.

(d) Subsequently the court at the bench delivered a most severe rebuke to defense counsel. Defense counsel was cross-examining Congressman Thomas when the following occurred (R. 50-51):

Q. [By Mr. Isserman] Now, Mr. Thomas, you say that the attorney for Mr. Eisler, Mrs. King, who is sitting at counsel table, made no effort to state any objection; is that your best recollection?

A. [By Mr. Thomas] There is one sentence in this testimony which indicates the only time that Mrs. King made any effort to do anything other than give out a lot of papers.

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Q. Just a minute. That sentence was addressed to you by Mrs. King, was it not?

Mr. Hitz [Government attorney]: What sentence are you talking about?

Mr. Isserman: The sentence the witness has just referred to. He knows what sentence I am talking about.

The Court: Let us not have any colloquy.

Mr. Isserman: Well, I would like to get an answer from the witness.

The Court: Will counsel come to the bench, please?

Counsel, as the court directed, then approached the bench, and the following occurred (R. 51, 52):

The Court: Mr. Isserman, the Court appreciates the fact that you are from out of town. I do not know what the practice is in your jurisdiction, but in this court the custom is for counsel to be urbane, courteous, and civil, and not to speak abruptly or opprobriously.

Mr. Isserman: I want to object to your Honor's remark and ask that it be stricken from this record, because there is no basis for it.

The Court: *I did you the courtesy of saying this at a bench conference, so that the jury should not hear my remarks; but you do not take them in the spirit in which they are intended. If you are not going to be urbane and courteous, I shall the next time I have to call attention to the fact do it in the presence of the jury.* [Emphasis added.]

Mr. Isserman: Will your Honor hear me?

The Court: No.

Mr. Isserman: I move that your Honor's remarks be stricken, as indicating nothing that has happened in this courtroom. I think counsel should be allowed leeway in cross-examination. . . .

The Court: They are allowed leeway, but they must always be within the bounds of courtesy.

Mr. Isserman: I believe I have observed those bounds.

The Court: No, you have not, particularly in the way you addressed the Court. Abruptness is not permitted. No local counsel ever departs from an urbane, courteous manner to the Court.

Mr. Isserman: I will try to be courteous and urbane in my remarks.

> The Court: I am trying to help counsel, because if you were a member of this bar and you acted like that, the consequences would be much more severe. However, I know that perhaps—well, I do not know what the custom is where you practice, so I want to give you the advantage of a warning in advance.

The italicized portion of the foregoing is a threat which, as we shall see, was subsequently fulfilled. The excerpt also reveals a hostility to counsel because he was "from out-of-town," and the court's recognition of the effect on the jury of the court's previous rebukes of counsel in the jury's presence.

(e) On a simple matter of identifying a telegram, the court by its intervention made difficulties for defense counsel and treated counsel in a brusque manner which was bound to influence the jury. Counsel was trying to indicate by whom a telegram was signed (R. 91, 92).

> Mr. Isserman: May I have the telegram dated April 12, 1947, addressed to the Honorable John F. McGohey, United States District Attorney, U. S. Court House, New York, signed—
> The Court: Don't go into all those details.
> Mr. Isserman: I want to identify the telegram.
> The Court: Just identify it briefly.
> Mr. Isserman: I am going to give the—
> The Court: Don't tell me that, just identify it briefly.
> Mr. Isserman: I am trying to do as Your Honor tells me.
> The Court: The Court has the last word.
> Mr. Isserman: I shall complete the identification by indicating that it is signed by Tom C. Clark, Attorney General.

(f) Several examples of the Court's impatience and intemperance in dealing with defense counsel appears from the following (R. 95-96):

> Q. [By Mr. Isserman] Mr. McInerney, I now ask you whether or not Defendant Gerhart Eisler from his arrival in the United States in June, 1941, applied for

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any change of status from his status as to being there on a transit visa, up to and including February 4, 1947?

Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: I offer to prove that this witness, if allowed to answer, would state that the defendant Gerhart Eisler never applied for change in status.

The Court: Well, you mean you expect him to say no. That is the offer of proof.

Mr. Isserman: No.

The Court: Because your question calls for a yes or no answer.

Mr. Isserman: May I have the question read, please?

The Court: No, you may proceed.

Mr. Isserman: Well, Your Honor, I would like to—

The Court: You ought to know how to make an offer of proof.

Mr. Isserman: I am asking the stenographer to tell me what I asked. I want to make sure the defendant's point is covered.

The Court: You may do it this time but don't do it again. You ought to know your own question.

Mr. Isserman: May I object to the Court's remark? I think it is improper and I ask that it be stricken out.

The Court: The Court never strikes its own remarks. You may object to the Court's remarks, but the Court never strikes its own remarks.

Mr. Isserman: I ask to have the Court's remark eliminated from the record.

Would you read the question?

(Pending question read by the reporter.)

The Court: You see, that calls for a yes or no answer.

Mr. Isserman: No, it doesn't, it calls for it in the alternative, and I would like to state an offer to prove.

The Court: State it.

Mr. Isserman: I offer to prove that this witness, if allowed to answer, would answer that the defendant, Gerhart Eisler, did not apply for a change in status from the status of an alien in transit to Mexico from the time of his entry in the United States in June, 1941, up to and including February 6, 1947.

The Court: I still say the question calls for a yes or no answer. I think you are wasting time unnecessarily and I sustain the objection.

Mr. Isserman: I am constrained to enter another objection to Your Honor's statement.

The Court: Very well, you have the privilege of doing so.

Thus several pages of display of feeling by the court against defense counsel are hinged upon the court's definite misconception, persisted in, that the "whether-or-not" question asked of Mr. McInerney was capable of being answered "yes" or "no". Although the colloquy was precipitated by the court's unnecessary criticism of the offer of proof, which had not been objected to, the court ended by criticizing defense counsel for wasting time. In the short passage quoted, the court rebuked counsel for not knowing how to make an offer of proof; refused at first to allow the reporter to re-read the question, then permitted it, but only with a warning that defense counsel should not again request the reporter to do so; and charged defense counsel with "wasting time unnecessarily." Moreover, when these remarks of the court were asked to be stricken from the record, the court replied that while counsel might object, "The Court never strikes its own remarks." (*Cf.* 9 *Cyc. of Fed. Procedure* 486-7 to the effect that an error in a remark made by a court "ordinarily is cured by the act of the judge in withdrawing it and ordering it stricken out.")

(g) At the close of one of the trial days, defense counsel indicated, after stating that he had completed the direct examination of the defendant Eisler, that he would have "one or two additional questions" to ask of Mr. Eisler when the court reconvened and would not like to be precluded from doing so. The court stated that he would not be precluded. At the beginning of the next day, when defense counsel was directed to proceed, the following occurred (R. 136):

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The Court: You may proceed.

Mr. Isserman: If the Court please, I had reserved the right to ask the defendant a few more questions. I should like to do so at this time.

The Court: You do not reserve the right; the Court will grant that privilege in its discretion.

Mr. Isserman: I mentioned it at the close of the session yesterday.

The Court: You may proceed.

Even this simple matter became a subject of rebuke to defense counsel.

(h) When the court sustained a defense objection that no foundation had been laid for introduction of a document offered by the prosecution, the court, although recognizing the legal soundness of the objection, nevertheless implied in the jury's hearing that defense counsel was being technical and was obstructing the trial in that the transcript, if it were in evidence, "would be helpful" and that "the objection, even if sustained, does not amount to anything." (R. 54).

(i) At one stage of the trial (R. 102-104), defense counsel, because of complaint by the petitioner that there had been too many bench conferences out of his hearing and that he could not keep abreast of the course of the trial, requested the court to allow petitioner to be present at bench conferences or that the conferences occur not at the bench and that whenever necessary the jury be excluded from the court room. The court refused to allow petitioner to approach the bench, but stated that it would permit defense counsel to have such conferences in open court except for "some offers of proof" which it would not permit to be made in open court. Subsequently the court refused to allow defense counsel to make certain offers of proof, including, as one of the grounds, that the court would not permit such offers of proof in open court (R. 108, 109). Thereafter, defense counsel offered to approach the bench to make such offers of proof. In the presence of the jury, the court refused in the following manner (R. 109):

The Court: No; in the light of the statement made by defense counsel I will not allow that. You stated at the last bench conference that you preferred everything done in open court; that your client objected to having things done at the bench that he could not hear. I informed you that the only purpose of a bench conference is to protect the defendant. Now, you may not change back and forth.

Mr. Isserman: I am not trying to change, if Your Honor please, but I believe an offer of proof is necessary in this case, and if we cannot make it in open court, we should like to make it at the bench, although I believe—

The Court: Proceed with the next question. . . .

The court, then, was punishing the petitioner because of the position defense counsel had taken on the question of bench conferences, and the court's comments, made in the jury's presence, were harmful to the petitioner.

(j) The court, at a subsequent time, did allow the defense counsel to make an offer of proof at the bench on a most important point, but only after a colloquy which had harmful effect on the jury. When the court finally did allow it to be made, the court was impatient with counsel and sought unduly to curtail counsel's offer, as the following shows (R. 133-135):

Mr. Isserman: Now, will you tell us what you intended to say to the House Committee on Un-American Activities in the three minutes you asked for before being sworn?

Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: May I make an offer of proof?

The Court: No, it is not necessary; I consider that irrelevant.

Mr. Isserman: I believe if your Honor would hear my offer of proof it would not be irrelevant. I believe your Honor would so consider it.

The Court: Ordinarily I do not permit offers of proof before the jury because that is an indirect way of getting testimony in before the jury after the Court

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has excluded it. Moreover, I consider the subject matter irrelevant.

Mr. Isserman: I am perfectly willing to make the offer of proof at the bench if your Honor will allow us to make it there.

The Court: You may come to the bench.

(Counsel for both sides approached the bench, and the following occurred:)

The Court: Make it very brief. Do not take *the full three minutes;* make it very brief. [Emphasis added.]

Mr. Isserman: The defendant, if allowed to answer this question, would state that he would have made the following remarks: "I am a political prisoner"—

The Court: No, I am not going to allow you to read the whole statement. What is the general import?

Mr. Isserman: To the Committee causing his illegal arrest because the illegal arrest was procured by Mr. Thomas and members of the House Committee on Un-American Activities; that the purpose of the arrest was for no purpose within the scope and power of the House Committee on Un-American Activities.

The Court: I think you have given me enough to give—

Mr. Isserman: If you will hear me.

The Court: Make it very brief.

Mr. Isserman: I am trying to make it very brief; that he had no opportunity for full consultation with his counsel; that he was going to ask for an adjournment until the matter of his arrest had been cleared up, and that the purpose of subpoenaing him had no relevancy to any matter within the powers of the Committee; that the Committee had called him because of his political views, and to prevent his departure to Germany.

C. Undue intervention in examination and cross-examination.

It has already been indicated that in the course of reprimanding defense counsel the court interfered substantially with the progress of the examination and cross-examina-

tion. Additional incidents of this prejudicial conduct are found in the record.

(a) At the most crucial portion of the petitioner's direct examination, the court intervened in a manner bound to give the jury the impression that the petitioner was guilty (R. 131, 132):

> Q. [By Mr. Isserman] Mr. Eisler, on February 6, 1947, when you were present before the House Committee on Un-American Activities did you at any time refuse to be sworn?
>
> A. [By the defendant] No; I made repeated efforts to be sworn in.
>
> By the Court:
>
> Q. When you say you made repeated efforts to be sworn you mean you made offers to be sworn on condition—
>
> A. (Interposing) Yes.
>
> The Court: (Continuing)—that first you be given an opportunity to speak?
>
> A. Correct.
>
> Q. You did not make any unconditional offer to be sworn, did you?
>
> A. It was conditioned if I would be allowed three minutes to speak I would unconditionally take the oath.
>
> By Mr. Isserman:
>
> Q. And did you tell the members of that Committee and the Chairman how long a period you desired in which to make a few remarks?
>
> A. Many times; exactly three minutes.

The Government attorney would not have been allowed to interpose these questions in the course of direct examination of the petitioner, as the court did. The court certainly did not act impartially when it addressed a leading question to the petitioner and characterized his effort to make objections to the Committee proceedings before being sworn as a "condition" imposed by the petitioner on the Committee's procedure.

(b) The petitioner was explaining under cross-examination that if the hearing before the Committee had proceeded

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he would have answered those questions which he believed to be relevant. The court intervened as follows (R. 143):

> By the Court:
> Q. You mean you would have made yourself the judge?
> A. [By the petitioner] By no means, Mr. Judge. If the Committee would have told me, 'Certain parts of your biography are relevant,' and would have convinced me they are relevant, I would have given them also parts of my biography.

Thus an unfavorable impression was created before the jury, even though both government counsel and court knew that the petitioner's obligations at the hearing before the Committee, had he been properly called and sworn to testify, would have been to answer only *pertinent* questions. Further, defense counsel, on redirect examination, was not permitted to clarify this point before the jury. (R. 146, and see D, post).

(c) The court assumed the prosecutor's role by a vigorous cross examination of the petitioner, which closed the government attorney's cross examination (R. 145).

> Q. [By Mr. Hitz] You never took the oath to testify, did you, Mr. Eisler?
> A. [By petitioner] I was prevented to take the oath by illegal proceedings of the Committee.
> Q. You did not take the oath, did you?
> By the Court:
> Q. Answer yes or no.
> A. I couldn't take the oath.
> Q. Answer yes or no. Did you take the oath?
> A. No, I didn't take the oath.
> Mr. Hitz: No further questions.

(d) In the course of the trial and in the presence of the jury, and excluding rulings at bench conferences, the court ruled on 52 objections made by government counsel. At the same time, the court on its own motion, without intervention of government counsel, made 34 objections directed

to the defense.[8] Under these circumstances, the jury could not but be convinced that the court was largely conducting the prosecution.

D. Inconsistent rulings on evidence.

The court made inconsistent rulings on questions of evidence favorable to the prosecution and prejudicial to the petitioner as follows:

(a) The prosecution was permitted to show that petitioner had counsel present (R. 27), and to argue that if legal objections were to be made, counsel was to make them (R. 49, 165); but the defense was not allowed to show that the committee practice was not to permit counsel to speak (R. 107, 150), and that counsel had accordingly instructed petitioner to make his own legal objection (R. 146, 149, 150).[9]

(b) The defense counsel was not permitted to introduce evidence as to what the petitioner wished to say before the Committee (R. 133-135), but the prosecution was permitted to argue, over objection, its version of what the petitioner intended to say (R. 166-168).

(c) The defense was not allowed to show that petitioner would have answered questions if permitted to make a three minute objection (R. 121, 135), but the prosecution was permitted to show that the petitioner would not have answered questions (R. 140-147). Indeed, the court even assisted the prosecution in this examination (R. 140-145). But when the defense attempted to clarify what was obviously a damaging

[8] *Objections by prosecution*: Tr. 71, R. 49, 58, 59, 89, 92, 93, 94, 95, 96, 97(2), 98, 99, 100, 101, 106, Tr. 271, R. 108, 109, 110, 113, 115(2), 116(2), 117(2), 118(2), 119, 120, 121(2), 122, 123(2), 124(2), 125(2), 126, 128, 133, 134, 135(2), 138(3), 149(2). *Objections by the Court*: R. 34(2), 37(2), 38, 42, 58, 79, 82, 84, Tr. 204, 206, R. 86(2), 87, Tr. 214, R. 89(2), 94, 106, 107, 127, 128, 130-131, 132, 133, 138, 140, 145, 146(3), 160, 162.

[9] It should be noted that the majority opinion of the appellate court considered it "important to note that appellant was accompanied to the hearing by his legal counsel" (R. 239). The majority opinion, however, did not comment on the inconsistent rulings of the trial court on this question, although the point was briefed and argued before the court below.

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impression before the jury, the court refused to allow the petitioner to explain that he would, as was his right, have declined to answer questions beyond the Committee's authority while answering pertinent questions (R. 146, 147).

E. Direction of a verdict of guilty.

The position of the prosecution was that the petitioner had refused to be sworn except on his own conditions. The position of the defense was that the petitioner had not made such a qualified refusal, but had merely attempted to state a legal objection to being sworn—as was his right. (R. 69, 73, 77-78). This raised an issue for the jury. The court, however, refused to give requested charges which would have submitted this issue to the jury (R. 180, requested charges 17, 18, 19, 20, 21). Instead, its charge at once found that there had been a refusal to take the oath and mis-stated the defense position. The court stated in its charge (R. 173):

> In this case it appears that the defendant was requested by the Chairman to take the oath several times, *but on each occasion the defendant either refused categorically or refused except on certain conditions, that he specified* . . .
>
> As I understand it, *the defendant contends that he wanted an opportunity to make a statement concerning his arrest before he was sworn.* The law is that a witness does not have the legal right to dictate the conditions on which he will or will not take the oath as a witness, or the conditions on which he will or will not testify. [Emphasis added.]

When the court's attention was called to the misstatement of the defense position, apparent in the second paragraph of the above excerpt, it agreed to supplement the charge (but only after the prosecuting attorney had joined in the defense request for clarification) (R. 175, 176). The supplemental charge was as follows (R. 177):

> Ladies and gentlemen: I am going to expand one little statement that I made to you. I have stated that

the defendant contends that he wanted an opportuniy to make a statement concerning his arrest. In order that there may be no ambiguity, I am going to read to you what the defendant said on the witness stand concerning this matter. . . .

He was asked: 'Why did you ask the committee for 3 minutes to make some remarks before you would be sworn on the morning of February 6?'

His answer was on this witness stand: 'Because I had objection against the whole, what I considered unlawful proceedings of this committee against my person.' This states his contention in his own words; *but I want to repeat again that a witness does not have the legal right to dictate the conditions on which he will or will not testify, or to insist on making a statement as a condition of taking the oath as a witness.* [Emphasis supplied.]

It is apparent that the portion italicized in this excerpt effectively nullified any correction made by the court in its statement of the defense position. But even were this not the case, the supplemental charge did not in any manner cure the error of the court's *finding* (first paragraph of preceding excerpt) that the appellant had refused to take the oath. This issue was in contest, and the jury had to find it to return a verdict of guilty, whether or not the defense position was accurately stated.

This finding of fact by the court, coupled with the instruction that the appellant could not lawfully condition his willingness to take the oath, removed from the jury the major issue of fact and was a direction of a verdict of guilty. The misstatement of the defense position further aggravated the situation. On this basis alone the judgment below must be reversed. *Cf. Weiler v. United States,* 323 U. S. 606; *Bollenbach v. United States,* 326 U. S. 607.

F. Refusal to permit defense counsel to object to court's charge out of the hearing of the jury.

A further instance of prejudice was the trial court's conduct in preventing defense counsel from objecting to its

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supplemental charge out of the hearing of the jury, despite counsel's express request for leave to approach the bench (R. 177).

Rule 30 of the Rules of Criminal Procedure provides in part:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection. *Opportunity shall be given to make the objection out of the hearing of the jury.* [Emphasis supplied.]

The purpose of the italicized sentence is obvious: to withhold from the jury knowledge of what portions of the charge counsel considers detrimental to his case. The court's violation of this clear rule and its purpose is, in addition to evidence of bias, an independent ground for reversal.

C. Comments at the hearing on the motion for new trial.

(a) Certain remarks made by the court at the hearing on the motion for new trial are unusually revealing. The following colloquy took place (R. 190):

> Mr. Isserman: . . . We say that there is no circumstance, as far as we understand the cases, in which a defendant can be punished before the jury by rebuking his counsel in the jury's presence.
>
> The Court: If counsel oversteps the bounds, I think the Court has a right to check counsel. *It is unfortunate that the defendant suffers.* But in this particular case the Court took care to explain to counsel at the bench conference the type of conduct and the type of manner that was expected. [Emphasis added.]

This exchange, coupled with the bench colloquy described in section B(d), *supra,* shows that the court was fully aware that its reprimands of counsel before the jury injured the petitioner. It also shows that the court realized that it had threatened to make the petitioner suffer for alleged (and,

we assert, non-existent) misconduct of defense counsel, and that it had carried out the threat.

(b) The court itself admitted that it had no feeling that counsel intended to be discourteous (R. 190), that the record did not divulge provocative conduct by counsel, and that the alleged misconduct merely "involved brusqueness of tone and matters of that kind" (R. 191).

(c) Throughout the hearing on the motion the court displayed impatience. Thus when counsel referred to the Canons of Judicial Ethics, the court stated (R. 198):

> I suggest that you confine yourself to the law and not tell me that the Court violated judicial ethics. I think the Court is a better judge of that.

The court also remarked (R. 201):

> You gentlemen have taken almost three-quarters of an hour on this motion for a new trial. That is longer than we ordinarily give to motions for new trials.

For other manifestations of impatience, see R. 186, 191, 195, 198, 199, 200, 202, 203.

H. Concluding analysis.

When an American judge exhibits bias and unfairness in a case before him, he injures one of the most cherished of our institutions. When his prejudice is directed against an alien dissident, such as the petitioner here, the injury is aggravated, for then, as in the Sacco-Vanzetti case, there is published to the world our domestic shame. The judge is, therefore, held to a high and unyielding standard in the execution of his oath of office. The first of the Canons of Judicial Ethics of the American Bar Association calls on the judge to be courteous to counsel. The fifth canon requires that he be "temperate, attentive, patient, impartial." So important to the judiciary is the preservation of public confidence and respect that the judge must not only *be* impartial, he must *appear* impartial as well. *Whit-*

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aker v. McLean, 73 App. D. C. 259, 118 F. (2d) 596. "The trial judge should be so impartial, in the trial of a criminal case, that by no word or act of his may the jury be able to detect his personal convictions as to the guilt or innocence of the accused." *Egan v. United States,* 52 App. D. C. 384, 397, 287 Fed. 958, 971.

The demonstration on appeal of trial court bias is customarily difficult, particularly when the bias is pervasive rather than exhibited in exaggerated outbursts. It is not often that, as in the *Whitaker* case, a judge uses a foul epithet in court. The record on appeal cannot convey the hostile tones of voice and attitudes, or the titters from the jury box, or the electrified atmosphere of the trial room. These intangibles existed in the trial of this case to an almost unbelievable degree, but they can be reconstructed on appeal only through the unsatisfactory medium of inference from a cold record. But the cold record here, we submit, is alone convincing that the trial court exhibited an active bias, hostility and prejudice toward the petitioner throughout the trial and in the sentencing. The trial judge was, when measured by the canons' requirements, discourteous to counsel, intemperate, inattentive, impatient, partial. He was not impartial and did not appear to be impartial. He discriminated in his treatment of the defense and the prosecution. He applied restrictive rules to the defense alone. He exacted retribution for fancied slights, as in refusing to entertain offers of proof. Under the guise of expediting the trial (which was short in any case), he prolonged it by unnecessary harassing of counsel and petty bickering. He rebuked and ridiculed defense counsel without cause. He minimized defense evidence. His inconsistencies in ruling on admissibility of evidence were adverse to the defense. In his raising of objections and in his cross examination of the petitioner he came close to conducting the prosecution. In his charge to the jury he directed a verdict of guilty, after misstating the defense position, by himself finding, and refusing to submit to the

jury, the only factual matter at issue. Worst of all, this misconduct seems to have been, to some extent at least, intended. The record shows that the trial judge realized the effect his rebukes would have on the jury; he threatened defense counsel to that effect, and, after carrying out his threat, justified his action on the grounds that a defendant must suffer for his attorney's supposed lack of urbanity.

This conduct on the part of the trial judge deprived the petitioner of the fair trial which is his constitutional right. The court's expressions in the jury's presence cannot but have influenced the jury deeply. *Starr v. United States,* 153 U. S. 614, 626. The petitioner was thereby and by the court's charge deprived of his Constitutional right to trial by jury. The court's derogatory comments on defense evidence exceeded the permissible bounds of judicial comment, and invaded the province of the jury. *Starr v. United States, supra,* at 624, 625. Its excessive participation in the examination of defense witnesses, particularly in cross examining the petitioner and in making objections, was prejudicial error. *Adler v. United States,* 182 Fed. 464; *Martucci v. Brooklyn Children's Aid Society,* 140 F. (2d) 732; *Williams v. United States,* 93 F. (2d) 685.

The trial court justified some of its actions on the basis that defense counsel was provocative. This we deny, and the court itself conceded that the record does not reveal as much. But even were such the case, it would not remedy the error. See *Lambert v. United States,* 101 F. (2d) 960 (C. C. A. 5th), holding that though prejudicial argument between court and counsel resulted from the fault of counsel it was nevertheless ground for reversal. *Cf. Commonwealth v. Stallone,* 281 Pa. 41, 126 Atl. 56, in which the court reversed for a display of feeling by the trial court, stating that it did not matter whether the court or counsel was responsible for the situation.

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The court below concluded in the face of a record to the contrary that the trial court merely properly confined the trial to the pertinent issues (R. 240, 170 F. (2d) at 281). It ignored completely, among other things, the trial court's recognition that his rebukes to counsel would and did influence the jury, the inconsistent rulings made by the trial court, its numerous manifestations of impatience, its violation of Rule 30 of the Rules of Criminal Procedure, and the fact that its charge amounted to a direction of a verdict of guilty. Various of these omissions were called to the appellate court's attention by the petition for rehearing (R. 249, points 6, 7 and 8), which was denied without comment (R. 250).

VI. The Court Below Erroneously Interpreted "Willfully" in the Statute.

The contempt statute, of course, punishes a default in appearance only if made "willfully." The trial court charged the jury that the term "willful" required only that the default be intentional as distinguished from accidental or inadvertent, and that it did not require bad faith or a bad purpose (R. 172). The appellate court decision, in sustaining the trial court in this interpretation, is at variance with decisions of this Court and the legislation's purpose.

United States v. Murdock, 290 U. S. 389, involved a prosecution for the misdemeanor of willfully refusing to supply certain information to the Bureau of Internal Revenue under the 1926 Revenue Act. The Court held that the defendant had been entitled to a charge making his good faith and belief relevant to the issue of the willfulness of his refusal. The Court stated (at pp. 397-398): "The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense."

In the *Murdock* case, as in this, the offense charged was only a misdemeanor. In both cases the offense is a refusal

to supply information to a creature of Congress, though here to a Committee of one House rather than an administrative agency created by both Houses. The statute involved in the *Murdock* case gave the sole penal remedy to vindicate the information-gathering power of the tax authorities. Congressional committees, however, may rely on remedies in addition to the contempt statute. *Jurney v. MacCracken, supra.*

There is, thus, even more convincing reason for giving a narrow construction to "willfully" in the contempt statute than was the case in the statute considered in the *Murdock* case.

In both the *Murdock* decision (at 394) and *Screws v. United States,* 325 U. S. 91, 101, the Court stated that "when used in a criminal statute ['willfully'] generally means an act done with a bad purpose." Since there are no peculiar circumstances in legislative history or otherwise to the contrary, the general meaning obviously must be applied to the statute here involved.

In the *Murdock* opinion, also, the Court clearly indicated that such was the construction to be given to the very statutory clause here involved. It pointed out (at 397) that in the contempt statute, "Two distinct offenses are described in the disjunctive, and in only one of them is willfulness an element." For this reason it approved *Sinclair v. United States, supra,* in not applying to the second offense, the one in which willfulness is not mentioned, the test of a bad purpose or evil intent. It clearly thus considered that this test would apply to the first offense—which is the one for which petitioner was indicted and convicted.

In *Hartzel v. United States,* 322 U. S. 680, the Court construed "willfully," as used in the Espionage Act, to require an evil purpose. It emphasized the need for restrictive interpretation of a statute which, like the one here, involves questions of freedom of speech.

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The assignment of a moral content to the term "willfully" affords the only method by which effect can be given to the legislative distinction made by requiring that the offense of a default be "willful" while making no such requirement as to the offense of refusal to answer questions.

It is well settled that statutory crimes, except for limited classes not here involved, are construed to require *scienter* as an element of the offense even where the statutory definition does not expressly include it. *United States v. Balint*, 258 U. S. 250, 251, 252; see dissenting opinion in *Screws v. United States*, 325 U. S. 91, 153. And it is elemental that to support conviction of any crime other than one involving negligence, the defendant's conduct must be intentional rather than inadvertent. The court below, therefore, gave no effect to the statute which it would not have had to give without the presence of "willfully", and this though the careful subsequent omission of the word stresses the legislative design to give special content to the word.

The construction we suggest is more in accord with the philosophy of the authors of the statute. The statute was drafted in 1857 [10] by a select House Committee composed of lawyers who had been in active practice.[11] The lawyers and jurists of that day were followers of Blackstone, and they shared the master's moralistic, natural law approach to crime. Blackstone considered that every crime requires a "vicious will." 4 Comm. *21. The great contemporary commentator on criminal law was Bishop, who wrote in 1856: "'Willful,' or 'Willfully,' sometimes mean little more than intentionally, designedly. Yet it is more frequently understood to extend a little further, and approximate the idea of

[10] 11 Stat. 157 (1857). For appointment of the Committee which reported the bill see Cong. Globe, 34th Cong., 3d Sess., 277. For report of the bill see *id.*, 404, and for substitution of language by the reporting committee, see *id.*, 427.

[11] See remarks of Representative Orr, chairman of the committee. *Id.*, 432.

the milder kind of legal malice; that is, as signifying an evil intent without justifiable excuse." [12]

In *Fields v. United States*, 164 F. (2d) 97, *cert. denied*, 332 U. S. 851, the court construed "willfully" in the statute as meaning merely "voluntarily" on the theory that this construction served the purported statutory objective to facilitate the gathering of pertinent information by an investigating committee. The legislators who introduced and supported the statute had in mind, however, a much more limited purpose. They wished only to increase the sanction against recalcitrant witnesses. They felt that, as a matter of law, witnesses who refused to appear or answer could not be incarcerated for contempt beyond the session of the House which proceeded against them. They pointed out that this sanction was an ineffectual compulsion if the session was near its end. It was to this problem that the legislation was addressed, and its authors consciously limited its scope; they knew that direct proceedings by the House were still available, and relied on those as their primary sanction. Cong. Globe, 34th Cong., 3d Sess., 405, 406 (remarks of Representative Orr).

It thus appears that the legislation did not have the remedial objectives ascribed to it by the *Fields* decision. Instead, its purpose was to cumulate penalties. The statute, therefore, should be construed strictly.

VII. A Refusal to Be Sworn Is Not a Default Under the Statute.

The "default" for which petitioner was indicted was a refusal to be sworn, and this is the utmost that the proof shows. A refusal to be sworn is not, however, a "default" within a proper construction of the statute.

"Default," of course, refers to a breach of duty (Black's Law Dict. (3d ed. 1933) 539), and we must look to the

[12] The quotation may be found in 1 Bishop, *Criminal Law* (9th ed.) sec. 428. Bishop first published his first volume in 1856.

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context to determine the duty involved. Here the duty is indicated in the text by the words "summoned" and "who, having appeared," and refers to a failure to appear. This comports with lawyers' jargon, in which "default" refers to a failure or omission to plead or appear. *Ibid.* 3 Coke on Littleton, c. 7, sec. 438. *Cf.* 3 Bl. Comm. *396. Such was the meaning assigned to "default" by decisions contemporary with the legislation. *Page v. Sutton, Orlopp & Co.,* 29 Ark. 304, 306 (1874); *Covart v. Haskins,* 39 Kan. 571, 574, 18 Pac. 522 (1888). So too the contemporary lexicon. 3 Oxford Eng. Dict. (1933) 126, quoting the 1828 Webster.

Although, as held in *Townsend v. United States,* 68 App. D. C. 223, 227, 228, 95 F. (2d) 352, 356, 357, cert. denied, 303 U. S. 664, the duty to appear comprehends the duty to attend, there is no authority of any kind, case or lexicon, which includes in a duty to appear an obligation to take an oath. In view of the settled necessity of giving a strict construction to a penal statute, the statute cannot be extended to embrace the latter obligation.

A limited construction is likewise appropriate in view of the availability of alternative proceedings. Either House of Congress may cite or punish for a contempt directly whether or not the conduct is subject to the statutory remedy, and the direct sanction has been frequently employed. *Jurney v. MacCracken,* 294 U. S. 125; *Barry v. United States ex rel. Cunningham,* 279 U. S. 597; *McGrain v. Daugherty,* 273 U. S. 135.

The statutory logic is to the same effect. As shown by the requirement of wilfulness in the case of one of the crimes covered by the statute and not in the other, Congress felt the need of a greater showing to punish a person whose conduct had not been observed (one who defaulted appearance) than to punish one who committed contempt in the committee's very presence. Since a refusal to be sworn takes place only at a hearing, it cannot be a type of conduct regarded as a "default." Whether or not it is a refusal to

answer questions is not material here, since the indictment did not allege that offense.

No statute *requires* a witness before a Congressional committee to take an oath. And the swearing-in of witnesses before such committees is not a universal practice. The Committee on Un-American Activities and its predecessor committees have themselves frequently accepted unsworn testimony.[13] If the indictment, as worded, states an offense, then one who for conscientious scruples insisted on affirming rather than swearing could likewise be indicted and convicted, since the indictment does not negative a willingness to affirm. Aside from the constitutional question raised by such a result, the statute should clearly not be so construed.

VIII. The Petitioner Was Not Required to Testify Before the Committee Because He Was Interned as an Enemy Alien and Was Also an Alien in Transit.

The petitioner cannot be punished for a default because he was under no duty to testify before the Committee.

A. Petitioner's immunity as an interned enemy alien.

It was stipulated that the defendant had been arrested and held in custody as an enemy alien at the time he appeared before the Committee (R. 80, 81).

An interned enemy alien is entitled to all the rights of a prisoner of war. *Basic Field Manual, FM 27-10, Rules of Land Warfare,* 16; *Law of Land Warfare prepared at*

[13] See, e. g., Hearings before Committee on Un-American Activities, vol. 2, pp. 1359-1360 (receipt of unsworn statements of Steve Gadler; 75th Cong., 3d Sess., 1938); vol. 4, pp. 2830-2837, 2999-3004, 3064-3065 (receipt of unsworn statements of Rev. Howard Stone, Mrs. Henry M. Roberts, Jr., John H. Cowles; 75th Cong., 3d Sess., 1938); vol. 7, pp. 4810-4830 (receipt of unsworn testimony of William E. Browder; 76th Cong., 1st Sess., 1939); vol. 10, pp. 6455-6456 (receipt of unsworn testimony of Charles S. Cox; 76th Cong., 1st Sess., 1939); vol. 12, pp. 7521-7525, 7525-7534, 7538-7553, 7555-7589 (receipt of unsworn testimony of Samuel Dickstein, Charles Kramer, Dorothy Waring, Thomas F. P. O'Dea; 76th Cong., 3d Sess., 1940).

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Judge Advocate General's School at p. 47; *United States Department of State Bulletin, vol. VI, No. 152, p. 445, 446, May 23, 1942*; 3 Hyde, *International Law 1862*; 2 Oppenheim, *International Law (6th Edition, Lauterpacht)* §127, pp. 299-300; Flory, *Prisoners of War*, 24-27; Wilson, *Treatment of Civilian Alien Enemies*, 37 American Journal of International Law 30 (1943); *United States War Department Mobilization Regulations*, No. 1-11 (1 April 1940) p. 3; *Rex v. Commandant of Knockalow Camp (Ex parte Forman)*, 117 Law Times Reports 627 (1917); *King v. Supt. of Vine St. Police Station*, 1 KB 268 (1916).

Furthermore, since the trial court prevented the defense from making an offer of proof on the subject (R. 109,110), it must be accepted for the purposes of this record that the Alien Enemy Control Unit of the Justice Department, which had supervision and control over enemy aliens arrested under Presidential warrants (R. 108), accorded to persons in custody as enemy aliens the rights guaranteed to prisoners of war by the Geneva Convention.

As one having the status of a prisoner of war, the petitioner could not be required to testify as to anything other than his "name, rank or regimental number," none of which was of consequence to the Committee. *Geneva Convention on Prisoners of War*, Article 5, 47 Stat. 2030; *Law of Land Warfare*, at p. 58; *Spaight, "Air Power and War Rights"* 340; 2 Oppenheim, *op cit.* §126 a., p. 294. We submit that the statute should not be applied to violate a treaty and accepted principles of international law.

B. Petitioner's immunity as an alien in transit detained in this country against his will.

The trial court excluded evidence offered to show that the petitioner's status in this country was that of an alien in transit, that his presence in the United States was involuntary, and that despite his repeated efforts to obtain permission to leave the country, he was detained here by

government authorities against his will (R. 95-98, 115, 116, 62, 63).

The authority of the House Un-American Activities Committee to investigate can constitutionally extend only so far as its inquiries are in aid of the formulation of valid legislation. *Kilbourn v. Thompson, supra; McGrain v. Daugherty, supra; In re Chapman, supra; Jurney v. McCracken, supra.* In view of the nature of the jurisdiction assigned to the Committee, no other power of Congress or of either House (as, for example, a House's power to determine the qualifications of its members) can possibly justify the Committee's inquiries.

To require the petitioner to assist Congress to formulate legislation would be in violation of international law. Each person owes primary allegiance to the state of which he is a citizen or subject. When present in a foreign country, he is, as stated by Justice Field, "bound to obey all the laws of the country, *not immediately relating to citizenship,* during . . . sojourn in it." Though his "absolute and permanent allegiance" is to his own sovereign, he owes to the country of residence "a local and temporary allegiance." *Carlisle v. United States,* 16 Wall. 147, 154 (emphasis added); *The Schooner Exchange v. M'Faddon,* 7 Cranch 116, 144; *United States v. Wong Kim Ark,* 169 U. S. 649, 693.

The numerous cases holding aliens subject to domestic laws involve application of the police or regulatory power. The duty to assist the formulation of legislation, however, is clearly a requirement of *allegiance,* not of the police power. It is thus distinguishable from a duty to testify in court as a witness, say, to a crime committed in the country of residence. It is an obligation which "immediately relates to citizenship", to use Justice Field's phrase.

It may be that an alien domiciled in this country has a sufficient nexus with our government so that he, within his "local and temporary allegiance," owes assistance to the

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legislative process. But to impose such an obligation on a transient alien, particularly one whose stay has been compelled by the very government seeking to impose the duty, seems clearly a requirement of allegiance which cannot be justified under the law of nations.

A clear analogy exists in the obligation, which arises from *allegiance,* to protect the state by taking up arms in case of war. The duty of assisting the government to formulate legislation is comparable to the duty of protecting the government from enemy action.

It is an accepted rule of international law that aliens do not owe to the state in which they reside the duty of bearing arms in its defense. Aliens are not, therefore, subject to compulsory military service without violation of international law. 4 Moore, *International Law Digest* (1906) sec. 548, collecting precedents; 3 Hackworth, *Digest of International Law* (1942) sec. 281. This nation has recognized this principle as regards aliens resident within its boundaries. It has insisted that foreign nations recognize it as regards American citizens resident abroad, as in 1804 when the State Department vehemently protested British impressment of American citizens in Great Britain. 4 Moore, *International Law Digest* (1906) 52.

Congress has infringed on this principle in minor respects in the selective service acts occasioned by World Wars I and II, by subjecting to the draft alien residents who have declared their intention to become American citizens. Even this infringement, limited as it was to residents, not transients, and to those who had already taken steps to change their allegiance, aroused vehement protests from sister states and caused our Executive embarrassment. See 3 Hackworth, *op. cit.* 602 ff.

Suppose an American citizen en route to France touched at an English port, or visited in England temporarily. Surely the House of Commons could not, without violating

international law, compel him to testify in order to assist Parliament to determine British foreign or domestic policy. Still less could it compel him to testify regarding actions and policies of the United States government. We can imagine the indignation which such a procedure would inspire in this country, and the representations which would be made by our State Department of violations of international law. Or can we suppose that on Winston Churchill's recent visit to this country, he could have been. compelled to testify before a Congressional committee to assist the formulation of federal legislation? And would not such an attempted inquisition of Mr. Churchill have seemed particularly outrageous if it dealt with the actions and policies of foreign governments, perhaps even including his own?

Doubtful as the case may be with respect to aliens who have taken up residence in this country of their own accord, it seems incredible that the Committee can exact testimony to aid legislative formulation from an alien in transit through this country or on a temporary visit. Still less can the Committee exact such testimony from an alien who has been detained in this country against his will and who was produced to the Committee as a prisoner.

We are not to suppose that Congress meant to violate the law of nations except upon the clearest showing of such a legislative intent. No such intent appears in the definition of the Committee's jurisdiction, and it follows, therefore, that the Committee had no power to compel the petitioner's testimony. This being the case, the petitioner did not violate the statute, since it is only as broad as the power of inquiry it protects. *In re Chapman, supra; Sinclair v. United States, supra.*

The majority below chose to ignore this question, and instead discussed the easier question of the authority of the Committee over a resident alien (R. 238, 170 F. (2d) at 279), an issue not presented by the facts and not argued or briefed below.

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CONCLUSION

The petitioner is a European anti-Fascist, a Communist, who in his vicissitudes as a political refugee from Hitlerism was detained in this country by accident and against his will. The House Committee on un-American Activities, in its campaign to censor political opinion and expression, procured his unlawful arrest and imprisonment, with the cooperation of the Attorney General. When he was brought in humiliating custody before the Committee, he sought three minutes to express objections to what he considered "unlawful proceedings of this Committee against my person" (R. 133). He was denied that opportunity. Thereupon he was, at the Committee's recommendation, cited for contempt by the House, following a debate which candidly revealed that the purpose of the proposed prosecution was not to vindicate the House's privileges, but instead to give the Department of Justice time to try to dig up a criminal case against him and to prevent his return to Europe (see footnote 5, *supra*). The debate revealed the intention of the Committee to "serve notice" on others who held opinions condemned by it that they would run like risks of persecution. 93 C. R. 1187 (1947); see footnote 5, *supra*. He was then denied his day in court by being subjected to an unfair trial.

Obviously, the petitioner's real "offense" is that he is a Communist, and the trial below stands for the proposition that a Communist is not entitled to a fair trial before being imprisoned. This is apparently the view of the House Committee on Un-American Activities and the Attorney General.[14]

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[14] Compare the following colloquy when the Atorney General appeared before the subcommittee on legislation of the Committee. Hearings before the Subcommitee on Legislation of the Committee on Un-American Activities, 80th Cong., 2d sess., on H. R. 4422 and H. R. 4581, February 5, 1948, p. 31 (emphasis added):

> MR. VAIL: • • •
> Mr. Clark, how would you feel about legislation preventing convicted aliens from being released on bail bond pending appeal of their convictions?

The issue here is not merely whether Gerhart Eisler should go to jail for one year, but whether our traditions of due process of law and equal protection to all will be vindicated before the world. The words of the petitioner, spoken at sentencing, apply (R. 211):

> To sentence in the United States a European anti-Fascist, who has fought his whole life against German militarism and imperialism, because he asked for three minutes to raise his objections against the abuse of power would unavoidably weaken the confidence of many millions of non-Americans in American justice and the American way of life. Such a sentence could not but lower the prestige of the United States in the eyes of the innumerable progressive-minded and freedom-loving peoples in the world. I ask you, therefore, to prove, by not sentencing me, that justice can be found in the United States for a European anti-Fascist despite the mad hysteria organized by the Un-American Activities Committee.

MR. CLARK: Convicted aliens?

MR. VAIL: I am thinking, for example of the *Eisler* case.

MR. CLARK: I see. The alien that has been convicted?

MR. VAIL: Yes.

MR. CLARK: Should not be released on bail—well, sir, I think that that would go a little far. I think it depends upon the individual. You take Eisler, for example. I ordered him picked up the other day. What I pointed out in my statement here was that we have this problem of aliens that we have ordered deported that continued to carry on the same type of activities that we based the deportation upon, but we are unable to keep them in custody because the courts have held that we can't do that except during the period when we try to get the papers.

So the other day I ordered Mr. Eisler picked up for deportation because he had been making speeches over the country that were derogatory to our form of government and our way of life, and we had a case down here against him also, but I think that a blanket provision that would not permit bail would go mighty far in that direction. I think you largely have to leave it up to the courts.

MR. VAIL: I don't think *we* went too far in the *Eisler* case or that it would go too far in a case similar to the *Eisler* case.

MR. CLARK: That is a case in the courts, and I would rather not discuss it, sir.

MR. VAIL: Well, you are certainly to be complimented for the action taken in that case because I happen to know something about the activities of Eisler during the period he was out on bail bond, and it seems to me there should be something done to curb that.

MR. CLARK: I shall always and the Department of Justice shall always bear in mind foremost the civil rights of the people, whether they be citizens or not, *but we shall also bear in mind that the 140,000,000 Americans are entitled to protection from those who try to force upon them a foreign ideology.*

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So too apply the words of this Court in *Chambers v. Florida*, 309 U. S. 227, 241: "No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution — of whatever race, creed or persuasion."

We ask this Court to extend to this alien Communist the rights under our Constitution and judicial system which have until now been denied him. We submit that the Court should reverse the judgment below and direct that the indictment be dismissed.

Respectfully submitted,

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APPENDIX

Statutes Involved

(a) Rev. Stats. § 102, as amended by c. 594, Act of June 22, 1938, 52 Stat. 942, U. S. C. Title 2, § 192:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

(b) Act of March 3, 1911, c. 231, § 21, 36 Stat. 1090 (formerly sec. 21 of Judicial Code, U. S. C. Title 28, § 25):*

> Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in section 24 of this title, or chosen in the manner prescribed in section 27 of this title, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a

* Now, with minor revision, 28 U. S. C. § 144.

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certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action.

(c) Sec. 121 (b), Legislative Reorganization Act of 1946, P. L. 601, c. 753, 79th Cong., 2d Sess., 60 Stat. 828, amends Rule XI (1)(q)(2) of the Rules of the House of Representatives to provide:

> The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.
>
> The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.
>
> For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.

(d) Article 5, Geneva Convention on Prisoners of War, 47 Stat. 2030 (1929).

> Every prisoner of war is bound to give, if he is questioned on the subject, his true name and rank, or else his regimental number.

If he infringes this rule, he is liable to have the advantages given to prisoners of his rank curtailed.

No coercion may be used on prisoners to secure information relative to the condition of their army or country. Prisoners who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind whatever.

If, because of his physical or mental condition, a prisoner is unable to identify himself, he shall be turned over to the medical corps.

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No. 369

In The

Supreme Court of the United States

October Term, 1948

GERHART EISLER, *Petitioner*,

v.

THE UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals
For the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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In The

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No. 255

Gerhart Eisler, *Petitioner*,

v.

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On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

I. THE COMMITTEE ON UN-AMERICAN ACTIVITIES COULD NOT VALIDLY COMPEL PETITIONER TO TESTIFY, NOR CAN PETITIONER BE PUNISHED FOR WITHHOLDING TESTIMONY.

A. The Nature of the Constitutional Issue.

"The sole constitutional issue," the government's brief states (at p. 24), "is whether the Committee can lawfully ask any question." This statement is, of course, inartistic.

The issue is not whether the Committee can lawfully ask any question, but whether the Committee can lawfully make anybody answer any question which it might ask within its expressed authority, and whether one who refuses to answer any such questions it might ask (or what is the same thing, refuses to appear in response to a subpoena) can lawfully be punished for his refusal.

But the issue, which is whether Congress can require anyone to answer any question *of this Committee*, is not resolved, as the government believes, by a demonstration that the Committee can, within its expressed authority, ask questions the answering of which *to some committee* Congress can require. We assert that the authorization given to this Committee on its face infringes the freedoms protected by the Bill of Rights. If we are correct, it follows, as we later demonstrate, that Congress cannot validly utilize *the very same authorization* even in an application which does not infringe those freedoms.

To put the matter in the concrete. Suppose Congress created a committee which it expressly authorized to determine which doctrines were, in the opinions of the members of the committee, "false," "dangerous" and "distasteful." Suppose it expressly provided that this committee should be responsible for censoring the expression of such doctrines by seeing to it that those who advocate or listen to such doctrines (not to mention those who associate with any such advocates or listeners) should be publicly labelled as enemies of the State, exposed to public odium, and blacklisted for public and private employment. Suppose it gave this committee power to compel testimony in aid of its censorship jurisdiction. Surely even the Department of Justice would concede that the authority of such a committee was constitutionally invalid and that its summons could be ignored with impunity. Yet it is plain that such a committee could, within its expressed jurisdiction, ask all kinds of questions the answers to which Congress

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could constitutionally compel if asked by a valid committee. It is plain that this hypothetical committee could even make the very inquiries the possibility of which, the govermnent's brief thinks (at pp. 24, 32, 33), save the validity of the Committee on Un-American Activities. It is even plain that our hypothetical committee could, within its expressed jurisdiction, exercise a censorship which Congress could constitutionally impose—as by censoring obscene matter passing through the mails or in interstate commerce. Nevertheless, the hypothetical committee is invalid as a whole. It follows that the test of whether a committee can ask some "proper" questions is not the test of constitutionality of its authorization, since it does not work. Indeed, any lively imagination can always suppose some "proper" question within any conceivable committee authorization. Nor can it be supposed that this committee can be validated merely by Congress' adding to its authorization a clause that it can investigate "all other questions relative thereto that would aid Congress in any necessary remedial legislation."

In our principal brief, what we demonstrated, and what the government's brief never actually contradicts, is that the Committee on Un-American Activities is this no-longer-hypothetical committee. We demonstrated that an analysis of the terms of the Committee's authorization shows that it is inevitably a censor, and one without restriction. We also demonstrated that the legislative debates, the Committee's own interpretations of its authority, the Committee's actions, and the Committee's pernicious effect on our democracy, all support this analysis.

Since such was the obvious and avowed purpose of our analysis of the Committee's authorization, reports and acts, the government might have spared us the platitudes (its brief, p. 25) that a committee is not invalid merely because it frequently misbehaves. Since we expressly disclaimed (our brief, p. 33), any suggestion that the Committee was

invalid merely because it had misused its powers, the government might have dispensed with arguing that "a possible—or a past—misuse of a power lawfully granted does not warrant a denial of the power's existence" (government brief, p. 25). Our point has always been that the Committee has no "power lawfully granted." And the remedy for this, like the remedy for other unconstitutional legislation, lies with the courts and not, as the government suggests, merely with the constituents of the offending Congressmen. We had supposed that one of the functions of the judiciary, under our system of checks and balances, was to protect a person from unconstitutional legislation even when the Congressmen who passed it are sufficiently popular with their constituents so as to be returned to office despite, or sometimes because of, their support of that legislation.

B. The Petitioner Has Standing to Raise the Constitutional Issue.

The issue here, then, is whether the Committee can constitutionally require an answer to *any* question it might ask. The presence of this issue obviously does not depend on whether or not the Committee in fact asked particular questions, and therefore petitioner's standing to raise the issue is not affected by the fact that no questions were asked. There is no sense to the government's suggestion (its brief, pp. 26, 27) that a witness must wait to be asked *a* question (perhaps, "What is your name?") before he can challenge the Committee's authority to require him to answer *any* question. It is enough that the Committee summoned petitioner, which means that it asserted the right to ask him some questions. Petitioner's contention is that the Committee could not lawfully require him to answer any question it might ask, including questions which Congress could require him to answer to some other agency or kind of agency. Whether or not this contention is correct is a different matter than whether the petitioner

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has standing to make it. As we pointed out in our principal brief (p. 11), one who ignores a summons has always been able to urge that the authority to summon is invalid—*i. e.*, that the summoning authority may not require him to answer any question it might ask within its expressed authorization.

The only basis on which this contention could not be considered would be if this Court should hold that the scope of its judicial review extends not to the validity of the Committee's power to compel any testimony but only to the constitutional propriety of particular questions it asks. Such a limitation of review is inconsistent with the numerous decisions of this Court which have ruled that the investigative jurisdiction of a committee as a whole, as well as particular questions asked by the committee, can be reviewed for constitutionality. *McGrain v. Daugherty*, 273 U. S. 135; *Sinclair v. United States*, 279 U. S. 263; *Kilbourn v. Thompson*, 103 U. S. 163; *Re Chapman*, 166 U. S. 661. So in *Daugherty's* case, the witness had failed to appear in response to a [redacted] summons, and the Court recognized that "we are not now concerned with the right of the Senate to propound or the duty of the witness to answer specific questions, for as yet no questions have been propounded to him" (at 160). Yet the Court reviewed at length "the question whether it sufficiently appears that the purpose for which the witness's testimony was sought was to obtain information in aid of the legislative function" (at 176). In this review, the Court considered the authorization as a whole for the inquiry involved.

Nor does there appear any reason of policy for this Court to adopt so novel a limitation on its jurisdiction, especially when there is involved the liberties guaranteed by the Bill of Rights. The government asserts that witnesses should be required to obey a committee's processes even though its authorization "is ultimately held to be unconstitutional" since this "allows the business of Congress to proceed" (brief, pp. 26, 27). By the same logic,

persons must obey every unconstitutional law, and cannot attack the validity of a statute in a proceeding brought to punish them for violation of the statute. Yet it is in this posture that challenges to validity have been classically made. Moreover, we do not understand why it is "the business of Congress" to authorize investigations beyond its constitutional powers; and if that is the business of Congress, we do not understand why it must be allowed to proceed. The orderly dispatch of *proper* Congressional business is amply guaranteed by the circumstance that one who disobeys a valid summons of a valid Committee does so at his peril.

C. The Committee's Authorization Is Unconstitutional on Its Face and as Applied to Petitioner.

In our principal brief, we demonstrated that the function of the Committee, like the hypothetical committee we earlier described, is to censor expression. We pointed out that this function was inevitable under an authorization which required the Committee to classify ideas into categories labelled with invidious names. We pointed out that the legislative history of the Committee's authorization, its interpretation of its authority, and its administration of its authority, all indicated that this inevitable exercise of the censorship function was the intended role of the Committee. At all times, we showed, the Committee's acknowledged purpose has been to "expose" advocates of certain ideas *in order that they might suffer the consequences of adverse public sentiment.* We pointed out that the standards of censorship were in terms, by legislative history, and by administrative construction and practice, so meaningless as to enable the Committee to censor any ideas its members dislike.

Our analysis, in short, was a demonstration of the accuracy of Justice Edgerton's statement that "the case is as

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if the enabling Act read 'the Committee shall expose unorthodox propaganda in order to restrain and punish it'." *Barsky v. United States*, 167 F. (2d) 241, 259, 260. On the basis of this analysis, we concluded that the Committee was unconstitutional.

The government's brief disputes not so much the validity of our analysis as our conclusion that the Committee's authorization, though of the nature demonstrated by the analysis, violates the Constitution. Indeed, the government virtually admits the validity of a large part of our analysis by conceding that one of the objects of the Committee is to publicize and "expose" "subversive and un-American activities" (government brief, pp. 36, 37). It should be remarked, in this connection, that the word "activities" is, in the text of the Committee's authorization, only "propaganda activities," a phrase which means, of course, only the "activities of propagating ideas."

1. The double-purpose argument.

The first of the government's arguments, presented as two different points, is that the Committee is valid "on its face" because it can, within its expressed authorization, make inquiries which are within the constitutional powers of Congress and which thus might assist Congress in exercising these powers. (Government brief, pp. 31-41 and 61-63.) Even if the Committee, it argues, may also make unconstitutional inquiries under its charter, nevertheless the legislation is saved by the constitutional possibilities, particularly in a case in which the petitioner "did not let the inquiry proceed far enough to permit the Committee to ask him any questions." *Id.* at 37.

Now it is indisputable that the Committee can make some inquiries which are within Congress' powers or which might discover information useful to the legislative process. The same is obviously true of any committee, no matter how fantastic or outrageous, which can be imag-

ined.[1] As we have earlier indicated, it is even apparent that the Committee can exercise a censorship which would be within the powers of Congress—as by censoring obscene matters passing in the mails or in interstate commerce. There ought to be added, however, the circumstance that the Committee's exercise of a general political censorship is not incidental or tangential to its exercise of functions in aid of proper legislative activities. On the contrary, the text of the Committee's charter, requiring as it does an invidious classification of ideas on a wholly undefined basis, the legislative debates on the Committee, the Committee's own constructions, and the Committee's practices, incorporated in its authority by the Congressional re-enactments — all these demonstrate beyond possibility of dispute that the chief function of the Commitee, and indeed the only one ever articulated, is to censor expression by "exposing" the advocates of forbidden doctrine to the consequences of an adverse public sentiment.[2]

---

[1] Suppose a committee authorized to investigate, with the aid of compulsory process, whether all children under the age of six should be drowned. The most obvious legislative contribution of such a committee, by the government's tests, may be "negative in character," as by persuading Congress "that for practical or constitutional reasons no legislation on [the] subject should be enacted" (government's brief, p. 36). In addition, the committee might discover information useful to Congress in determining the size and character of federal appropriations for educational purposes (*cf. id.*, p. 33).

[2] The Government's own catalogue of the Committee's actual contributions to the legislative process, as distinguished from those which are imaginatively possible, is to the same effect. The "contributions" catalogued are, in the first place, remarkably few, both in the absolute and as relative to the tremendous general censorship exercised by the Committee. Secondly, the "legislative contributions" cited include measures which, on the government's own showing, are only incidental results of the Committee's investigations, thus supporting our thesis that at most the Committee's performance of legitimate functions is collateral to its general censorship, rather than the reverse. The only nexus between the Voorhis Act and the Committee is that the act was introduced by a member of the Special Committee—and this one who frequently objected to the Committee's practices (see, *e. g.*, Mr. Voorhis' minority report in H. R. Rep. No 2277. 77th Cong., 2d Sess., 1942). The nexus with the non-Communist affidavit provision of the Taft-Hartley Act is not that the Committee investigated to determine whether such a provision was desirable, but only that the provision largely rests on facts found by the Committee in the exercise of its regular censorship operations. It is curious that the government omits from its catalogue of the Committee's legislative accomplishments the rider which this Court held invalid as a

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It is apparent that a general grant of political censorship powers cannot be saved because some permissible action may be, or has been, taken thereunder. If this were the case, the First Amendment would indeed be an impotent protection. This Court, recognizing that circumstance, has repeatedly held that legislation which on its face infringes protected freedoms of expression and assembly is wholly invalid even if it can also be applied in unprotected areas. *Thornhill v. Alabama*, 310 U. S. 88; *Winters v. New York*, 333 U. S. 507; *Stromberg v. California*, 283 U. S. 359; *Herndon v. Lowry*, 301 U. S. 242; *Cantwell v. Connecticut*, 310 U. S. 296; *Martin v. Struthers*, 319 U. S. 141; *Jamison v. Texas*, 318 U. S. 413; *Carlson v. California*, 310 U. S. 106; *Schneider v. Irvington*, 308 U. S. 147; *Lovell v. Griffin*, 303 U. S. 444; *DeJonge v. Oregon*, 299 U. S. 353.

The government contends that these cases are not in point on the grounds that they apply only to criminal statutes which restrain speech. This contention is preposterous in two respects.

First, there is here involved restraint by a criminal statute, namely Rev. Stats. sec. 102, which punishes disobedience to the Committee's processes. If the Committee's process on its face permits restraint of expression, then so, obviously, does the penalty for disobedience of that process. The restraint on expression flows not merely from the Committee's authority to summon witnesses, but also, and more importantly, from the fact that disobedience to its summons is punishable by the criminal statute under which petitioner was convicted. In short, Rev. Stats. sec. 102 cannot, under the cited decisions, be applied to punish disobedience to the Committee's summoning authority if that authority (and hence the penalty for disobedience)

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bill of attainder in *United States v. Lovett*, 328 U. S. 303 (see at 308 for ascription of responsibility for the rider to the Committee). We think, too, that the Committee's censorship activities can hardly be validated by its promotion of legislation which, like the Mundt-Nixon bill and the Lovett rider, seeks only to implement the Committee's censorship activities or to create additional mechanisms for federal censorship.

is broad enough to restrain protected utterance. *Cf. Thomas v. Collins*, 323 U. S. 516; *M. Kraus & Bros. v. United States*, 327 U. S. 614. The criminal penalty is here involved more directly than in those decisions in which the stated rule was applied in an injunction suit seeking to invalidate a licensing of expression. *Cf. Hague v. CIO*, 307 U. S. 496; see *Thornhill v. Alabama, supra*, at 97.

Secondly, the distinction suggested by the government is without merit. The cases cited are concerned with the fact of restriction of freedom of speech and assembly, not with the form of the restriction. They govern *any* "regulations of the liberty of free discussion." *Thornhill's* case, at 98. Their logic is that the mere existence of a statute which is broad enough to restrain protected speech as well as unprotected activity is itself a restraint of protected speech. "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of expression." *Id.* at 97. Such a broad statute all too "readily lends itself to harsh and discriminatory enforcement" which "results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." *Id.* at 97, 98. Accordingly, these cases hold, a statute which operates in the area of speech must be narrowly drawn to cope with specific evils, and if it is not, it is wholly condemned. This logic is equally applicable to restraints on speech which, like the Committee, represent more subtle technics than criminal statutes directly prohibiting expression. If, therefore, Congress wishes to regulate speech by disclosure technics, it is obliged to define adequately what speech is to be regulated. If it merely wishes to investigate certain types of speech it may not frame its delegation of power so as to enable regulation of protected speech. If it does, the legislation is invalid as a whole.

Even if, *arguendo*, the Committee's authorization cannot be generally invalidated because it might be applied to

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legitimate areas, nevertheless, petitioner's *conviction* must still be invalidated. For if it is true that he might have been called for a legitimate purpose, it is equally true, so long as the Committee's authorization covers both purposes, that he might have been called for an invalid purpose. And as long as this point is unresolved, petitioner cannot constitutionally be convicted. *Sinclair v. United States*, 279 U. S. 263, 296, 297; *Stromberg v. California*, 283 U. S. 359. In this case we need not even go so far, for not only is there a complete absence of proof that the Committee summoned petitioner in the exercise of a legitimate function of Congress, but on this record it must be taken that it was exercising an invalid function. As we have seen, the trial court refused to allow petitioner to prove that he was summoned only to be a victim of the Committee's illegal censorship activities. Our principal brief, pp. 48-53; see *post*, pp. 19-21. The government, therefore, misstates the situation when it says that "this case must be treated as if the Committee had intended — as, for all we know it did — to ask petitioner" about Soviet propaganda to overthrow the government by force, etc. (brief, p. 24). On this record, it must be taken that the Committee intended only to punish petitioner for his political beliefs and sought no information of any kind, either about the Soviet Union or anything else. (Further, as we state subsequently, if the Committee really wanted testimony from petitioner on that or any other subject, it would have asked him questions.)

2. The power of disclosure.

The government next argues that Congress may investigate for the sole purpose of informing the public "within the field of its constitutional jurisdiction" (brief, p. 37) or "at least so long as the matters to be disclosed are related to a substantive congressional power" (brief, p. 42).

We do not dispute this thesis, but it is here irrelevant. The question here is not whether Congress may investi-

gate to inform the public on matters within its constitutional jurisdiction or whether it may regulate by disclosure technics what it may constitutionally regulate otherwise. The Committee's function is to "expose" (i. e., to regulate by disclosure technics) what the Committee itself acknowledges to be beyond Congress' powers to regulate. The question here is whether Congress can by disclosure technics regulate speech and assembly which it cannot constitutionally regulate otherwise. The question is not the general propriety of disclosure, but whether Congress may so utilize disclosure and inquiry methods as to effectively restrain freedom of speech and assembly.

3. The First Amendment.

On this question the government asserts that the Committee's authorization "imposes no restraints. After testifying before the Committee a witness can believe, say and do the same things as he could do before" (brief, p. 47).

In its brief (pp. 42, 43), the government recognizes that the requiring of information may be, and often has, been used as a type of regulation. Yet here it assumes (contrary to the Committee's own articulations of its function) that the requiring of information cannot possibly be a regulation of speech and assembly.

The fact is that the government's position is at once unrealistic and remarkably callous. Many persons, including the Hollywood writers, directors and producers who are *amici* in this case, have been deprived of their means of livelihood by the Committee's actions. These and many others have had their reputations ruined by the Committee. Still more persons are constrained daily to guard their speech and associations out of fear for the Committee. Yet all of these, we are told, have been subjected to no restraint.

It is true that a person can, notwithstanding the Committee, say what he pleases — but only at the risk that his life will be wrecked.

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The Committee's victims (who include the public as a whole) know that the Committee restrains freedom of speech and assembly. The Committee knows it, and declares that such is its purpose. Both the majority and the minority in the *Josephson* and *Barsky* cases recognized the restraint. The President of the United States recognized it when he complained that the Committee's investigation violated the Bill of Rights (our principal brief, p. 28). The Attorney General recognized it when he said to the Committee: "The program of this Committee in bringing into the spotlight of publicity the activities of individuals and groups can render real service to the American people. *There is no more potent weapon even on the statute boks themselves.*" Hearings before the Subcommittee on Legislation of the Committee on Un-American Activities on H. R. 4442 and 4581, 80th Cong. 2d Sess., Feb. 5, 1948, emphasis added. (On a later occasion, after the Committee had attacked the Department of Justice, the Attorney General charged that its investigations were "contrary to our democratic system." See our principal brief, p. 29).

Apparently, the Solicitor General stands alone in his innocence. This innocence, be it noted, extends not only to the impact of the Committee, but to any possibility of oppressive use of inquisitorial powers. Yet the serious nature of such abuses has been frequently commented on by this Court. (See our principal brief, pp. 45, 46, including quotations therein from *Olmstead v. United States*, 277 U. S. 438, 478 and *Sinclair v. United States*, 279 U. S. 263, 292). It is, perhaps, the unawareness of this problem that causes the government to fail completely to refute or even mention our argument that the Committee's subpoena power violates the Fourth Amendment.

The government also asserts (brief, p. 49) that the First Amendment is not concerned with the "indirect consequence of public disclosure." We think that the First

Amendment is concerned with protecting freedom of speech and assembly from legislative infringement, whether the infrigement is direct or indirect, and whether it is effected by disclosure technics or otherwise. The fact is, of course, that the government's approach to the First Amendment in terms of "direct" or "indirect" infringement is misleading. The First Amendment protects certain interests from governmental invasion, and nothing in the Amendment limits its protection to apply only against certain types of invasion. Here the interests in expression and assembly are invaded by federal action which subjects speakers and listeners to being labelled as enemies of the state. This is not an "indirect" invasion; it is simply one kind of invasion, and one to which the First Amendment applies. Thus in *Illinois ex rel. McCollum v. Bd. of Education,* 333 U. S. 203, an interest included within the First Amendment was protected against invasion by disclosure of religious non-conformity, resulting in embarrassment and humiliation. Similarly, protection against invasion of First Amendmnet liberties by disclosure requirements was afforded in *Thomas v. Collins,* 323 U. S. 516 and *W. Va. Bd. of Education v. Barnette,* 319 U. S. 624.

Finally, the government argues that First Amendment rights are not absolute and must be balanced against other needs of the community. We assert that First Amendment rights are absolute, and if they are not, they are qualified not by any balance of interests but only by the concept of clear and present danger. So far as the government's brief is concerned, Justice Holmes' dissents might never have been written. Nor do we understand how in one breath the government can concede that "the First Amendment applies to all the powers of Congress" (its brief, p. 48), while in the next it can urge that the First Amendment does not limit "the power to compel testimony for public purposes" (*id.,* p. 50).

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4. The indefiniteness of the Committee's authorization.

The demonstration in our principal brief of the indefiniteness of the Committee's authorization served the following main purposes: (a) it was proof that the function of the Committee was not to investigate in any *bona fide* sense, but to make invidious classifications of ideas with attendant censorship results; (b) it was proof that the censorship was unlimited, and hence was peculiarly destructive of the rights guaranteed by the First Amendment, and violated the Fourth, Ninth and Tenth Amendments; (c) it was proof that the Committee punished (by "exposure") for non-conformity with an undefined code, and hence violated the Fifth Amendment.

These points are in no way met by the government in its argument that the separation of powers doctrine does not apply to delegation of authority by Congress to one of its committees. We do not claim that this Committee or any other committee of Congress is invalid merely because its authority is delegated in broader terms than are permissible in a grant of authority to an executive agency. The vagueness of standards in the case of the Committee must be taken with the facts that it is a vagueness in classifying speech and relies on terms of opprobrium. Its pertinency, therefore, is first, to assist the analysis that the Committee's function is censorship, and secondly, to explain the extent and nature of the censorship. Our argument thus has no application to a case, in which, say, Congress simply delegates to a committee naked authority to investigate matters affecting interstate commerce. Such a delegation of authority would not be invalid on its face, although, of course, a particular inquiry undertaken by the commerce committee could be challenged as beyond the powers of Congress. Furthermore, the committee would be obliged to inform witnesses of the subject-matter of a pending inquiry. Such is, of course, the regular practice of legislative committees.

The government, however, also contends that the standards of the Committee are reasonably definite. Now we see what the government means by its numerous references to considering the Committee's charter "on its face." First of all, it means that one looks mostly at only one-third of the face, as by concentrating on the phrase "the principle of the form of government as guaranteed by our Constitution," while largely ignoring the alternative standards, "un-American" and "subversive." It also means that the wording of the authorization is not analyzed and that no regard is paid to the legislative history, which demonstrates that the House of Representatives knew that the standards were meaningless, or to the Committee's constructions and practices. "On its face," then, means to the government "out of context."

The government's explanation of the content of the standards still leaves us, at least, ignorant of their meaning. But if there may be some meaning which eludes us, we suggest that this Court is not entitled to assume it so long as neither the legislature nor the Committee has ever recognized it.

5. Conclusion.

The government's argument and the somewhat different reasoning of the majorities in the *Barsky* and *Josephson* cases are, perhaps, the most convincing evidence yet offered of the invalidity of the Committee on Un-American Activities. What are we to say of a Committee whose constitutionality is justifiable not on the basis of reality but only by flights of fancy? Which is sustainable only because of what it might do, without serious reference to what it does do? Whose standards are understood and defined only by brief-writers and never by its creators or itself? And whose tremendous, and boasted of, impact on speech and assembly must be wholly ignored?

Finally, what are we to say of a treatment of the First Amendment which makes it not a firm bulwark against

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restraint of expression, but simply a technical barrier to be avoided, like tax statutes, by skillful maneuvering?

Never in its history has this Court had before it a more powerful repression of speech and assembly, and thus of our democracy itself, than that represented by the Committee on Un-American Activities. If this repression can survive judicial review, it is hard to see that the First Amendment retains much function.

Against this hard fact, the government and the *Barsky* and *Josephson* majorities plead only, in essence, the importance of permitting Congress to investigate. They envisage all types of threats to our security by fifth-column propaganda. But we have not disputed the right or power of Congress to investigate, under appropriately framed legislation, propaganda which endangers our security. The Committee on Un-American Activities is invalid because Congress is through it regulating protected speech by use of investigative and disclosure technics. Invalidation of the Committee will reassert the recognized limitations on Congress' power to regulate speech and assembly. It will in no way interfere with Congress' powers of investigation.

II. THE PETITIONER WAS NOT SUMMONED TO TESTIFY ON A MATTER OF INQUIRY COMMITTED TO THE COMMITTEE.

The government urges that there was sufficient evidence that petitioner was summoned to testify on a matter under inquiry before the Committee (brief, p. 86), but it points only to the Resolution itself and to the subpoena. The Resolution, however, is only the authorization to the Committee. It constitutes no evidence that the Committee was in this case acting pursuant to its authorization.[3] The

[3] Nor, obviously, is such evidence supplied by Mr. Thomas' bald recital that on certain dates the Committee was "functioning pursuant to the Resolution" (R. 13). Such evidence would have to be supplied by testimony on the subject-matter of the inquiry to which petitioner was summoned.

formal recital in the subpoena is evidence of nothing but the form of the subpoena. In essence, therefore, the government is arguing not that there was sufficient evidence to support a finding that petitioner was summoned to testify on a matter under inquiry properly before the Committee, but that it was not necessary to introduce any such evidence. For if one relies solely on the Resolution itself and the issuance of a formal subpoena, one is simply adopting the doctrine of the trial court that it must be presumed that the Committee was acting within the terms of its authorization when it issued the subpoena.

As we showed in our main brief (pp. 48-51), however, the statute, the indictment, and *Sinclair v. United States*, 279 U. S. 263, all demonstrate that no such presumption is permissible, and that the government must offer affirmative evidence to prove that petitioner was summoned to testify on a matter of inquiry committed to the Committee.

The government's discussion of the *Sinclair* case (brief pp. 88-90) is completely confused, and it is difficult to determine precisely what point the government is attempting to make in the course of it. It is sufficient to note that in that case, the Court considered at some length the evidence to show that the defendant there had been summond on a matter under inquiry before the committee and that the particular question asked of the defendant was pertinent to the inquiry. Nowhere did the Court in that opinion say or indicate, as intimated by the government (brief, p. 89), that reference to the underlying Resolution itself was sufficient proof that the defendant had been summoned on a matter under inquiry. On the contrary, the Court discussed in some detail the nature of the inquiry before the Committee and the relation thereto of the testimony sought from the defendant, and it expressly found that the government had met its burden of proof.

If the prosecution had here sought to follow the reasoning of the *Sinclair* case, it would have offered testimony to

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show the precise nature of the inquiry before the Committee, the evidence sought from the petitioner, and the relation between the two.[4] But in the words of Justice Prettyman, quoted in our principal brief at p. 49, "This record does not show, and we do not yet know, what it was that the Committee wanted appellant to testify about."

The record does show, however, that the petitioner offered to prove that he was not summoned on a matter of inquiry committed to the Committee, but was denied this opportunity by the trial court. (See our principal brief, pp. 49-50). The government admits, verbally at least, that the prosecution had to prove that petitioner was summoned on such a matter. Accordingly, even if the government had proved this fact, certainly the defense had to be allowed to contradict the government's evidence by introducing countervailing evidence.

The government argues, however, that such countervailing evidence is not admissible because it necessarily concerns only the motives of Committee members. But it is no more true that the countervailing evidence necessarily concerns motives than that the evidence it seeks to negative necessarily concerns motives. So here petitioner was seeking to introduce evidence of "objective facts" (government's brief, p. 90), and there is no basis for the government to assume the contrary by asserting that "the only way petitioner could establish such ulterior purposes would be to interrogate the various Committee members as to the reason why each individual voted to subpoena petitioner." On the contrary, petitioner intended not to investigate the reasons of individual Committee members but, instead, to prove the expressed, formal action of the Committee as a Committee—as by showing that the Committee met and voted to have petitioner subpoenaed and arrested in order to humiliate and harass him for his political beliefs and

[4] Under the *Sinclair* case also (see at 295), petitioner should have been permitted, as we contend below, to introduce evidence that the investigation was "avowedly not in aid of legislation."

to prevent his departure to Germany, and that the Committee as a Committee had no interest in obtaining from petitioner any information whatsoever. So in *McGrain v. Daugherty*, 273 U. S. 135, 176, the Court reviewed "the purpose for which the witness's testimony was sought."

To accept the formulation of the government simply prevents any defendant from ever proving that he was summoned for a non-legislative purpose; for the government argues that any such a showing goes only to "motives" and that "motives" are not subject to scrutiny. Accordingly, the gist of the government's position is, like that of the trial court, that abuse of authority by a Congressional committee is not subject to judicial review. The difficulty with this position, once it is revealed, is that it conflicts with all the decisions of this Court on the subject and with the legislative history of the contempt statute.

It is apparent from the present record, even in the absence of the proof which the trial court erroneously excluded, that the Committee as such desired no information from petitioner. Can it be seriously urged that if it wished information from the petitioner, it would have troubled to have the Attorney General take him into custody and haul him into the Committee room, only to have him immediately hauled out because he had asked for three minutes? Can it be seriously suggested that, on the one hand, the evidence which the Committee sought from this petitioner was so essential to the functioning of government that the petitioner must now spend one year in jail and pay $1000 fine for withholding it, but, on the other, the evidence was not so important as to be worth three minutes of the Committee's time? We do not urge these considerations in any attempt to be facetious, or to suggest that a Congressional committee must suffer what it may consider to be an impertinence, but only to demonstrate that no committee interested in obtaining information would have behaved as this Committee did. If it was information the Committee sought, without excusing impertinence, it surely

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would have voted to cite the petitioner for contempt, thus assuring punishment for any impertinence, and then have endured for three minutes the statements of the petitioner, following which it would have obtained his testimony. The Committee, however, like the Queen of Hearts, said only, "Take him away—Off with his head."[5] And this conduct was rational only because the Committee had already achieved its sole purpose with the witness—which was to humiliate and harass him and find a basis for criminal punishment, not to obtain testimony.

III. THE ILLEGAL CONDUCT OF THE COMMITTEE AND PETITIONER'S ATTEMPT TO MAKE A LEGAL OBJECTION THERETO.

A. In our principal brief we argued that petitioner cannot validly be punished for refusing to testify under the illegal and ignominous circumstances, instigated by the Committee, of his production at the hearing. The government apparently concedes that the due process clause prohibits punishment wherever there is presented "a basic absence of fair play or . . . an arbitrary or improvident use of power" (its brief, pp. 98, 99). It asserts, however, that in this case there was no such an abuse of power by the Committee. We are content to rest on the record for the resolution of this difference.

B. We also argued that the petitioner had a right under the circumstances to make an objection to being sworn

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[5] See testimony of Chairman Thomas at R. 52-53:

Q. Well, what did you do after Mrs. King [Counsel for petitioner] said, "May I be heard?" A. Well, prior to that the committee had voted to cite this man for contempt. We were dismissing the witness. Miss King said nothing until we had decided to dismiss the witness.

Q. What did you answer when Mrs. King said "May I be heard, Mr. Chairman?" A. "Take the witness out."

Q. Did you recognize Mrs. King after she had made that request to be heard? A. It was too late then—too late.

One may seriously ask, at this point: Too late for what?

before taking the oath, and that, whether he had such a right or not, he was not guilty of a "willful default" under the contempt statute, if all he tried to do at the hearing was to make such an objection and if he was willing, once the objection was overruled, to take the oath and testify.

We complained, therefore, that it was error for the trial court to exclude evidence relevant to whether petitioner was merely trying to make such an objection, and to refuse to instruct the jury, as requested, that it must acquit if it found that such was the case.

The government disregards the wholesale exclusions of evidence that we complained of in this respect (our principal brief, p. 54, n. 6), and reduces the point only to the exclusion of one piece of this evidence — namely, the contents of the three-minute statement. It also ignores the refusal of the trial court to give the requested instructions.

Now it is clear that the evidence offered and excluded was all relevant to the defense that petitioner had merely tried to make an objection, and that it was evidence which might have persuaded the jury that such was the case. Indeed, evidence of the contents of the alleged objection (*i.e.*, of the contents of the three-minute statement) was relevant evidence that the making of an objection was intended. The government's contention to the contrary is manifestly unrealistic,[6] but even if its contention were sound it would not justify the exclusion of other evidence which was relevant. It is obvious that relevant evidence cannot be excluded merely because some evidence on the subject has been allowed, so long as the further evidence offered is not burdensomely repetitive. The evidence here excluded was not repetitive at all.

[6] It should be added that the government's characterization of the three-minute statement as an "intended attack upon the political motivation of the Committee" (its brief, p. 95) is unwarranted and disingenously stated. This statement (described at R. 134, 135) was an appropriate objection to the Committee's illegal treatment of petitioner and to its right to require his testimony.

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Furthermore, so long as there had been introduced relevant evidence on the subject, as the government insists, the issue should have been submitted to the jury under appropriate instructions. These instructions the trial court denied (instead, it gave instructions which eliminated the issue — our principal brief, pp. 85 ff.); yet the government, significantly enough, is wholly silent as to this palpable error.

C. As we have indicated, it is not necessary for a reversal of the conviction that petitioner had a constitutional right to make an objection before being sworn. Even without such a right, his attempt to object would not be a willful default, and evidence on the subject should therefore have been allowed and submitted to the jury. In addition, however, we assert that petitioner did have a constitutional right to object, both because of the circumstances involved and also because witnesses generally have such a right. This being so, he could not validly be punished for asserting or trying to assert the right, evidence was admissible as to whether such was the case, and appropriate jury instructions were required.

The government apparently concedes that the Constitution does confer on a witness the right to make objections, but it confines that right only to questions. Thus it states (brief, p. 97): "The Constitution certainly does not require that a witness be allowed to make an objection before he is sworn. As long as the objection is allowed to be made before any unlawful question is required to be answered, the witness' rights are amply protected." But if a witness' objection is not to any specific question but to being sworn, to being asked any question, and to the proceeding as a whole, how can his rights be "amply protected" if he can assert them only after the damage complained of is done? Even Representative Thomas grasped this simple truth — that an objection to being sworn must be made befor the oath is taken (R. 49).

The government also urges that petitioner did not make clear to the Committee that he wished to make an objection. We do not understand why such a circumstance would deprive him of his right, if he had intended in fact to exercise it. But leaving this point aside, the fact is that the jury might have found, if appropriately instructed as requested, that petitioner did indicate that such would be the nature of his statement when he said that he was a political prisoner and that "a political prisoner has to do nothing" (R. 46, 47). It was not his fault if the Committee cut him off from further explanation. The most that can be said is that his language was obscure or inartistic. But petitioner is an alien and a layman, and the Committee practice (as we attempted to show by evidence which the trial court rejected) was not to permit objections to be made by counsel for a witness.[7]

The government's discussion of the facts in this part of its argument thus ignores the portions of the colloquy at the hearing which indicated petitioner's objection. It may be added that its reliance on petitioner's statement, "I am not going to take the stand," fails to take into account petitioner's testimony (R. 129) that he was interrupted before he could complete the sentence by adding "before I make a few remarks." The jury, of course, could have disbelieved this testimony, but they were never given a chance, under the trial court's charge, to either believe or disbelieve it.

The sum of the government's contention, then, is that petitioner must be punished, not for willfully obstructing the legislative process, but for failing to make himself un-

[7] Remarkably enough, although the trial court excluded this evidence as irrelevant, yet it, the prosecutor, and the appellate court all considered that the presence of counsel raised a legitimate inference that petitioner did not want to make an objection because his counsel was there to make it for him! R. 75, 165, 239. The government now draws the same inference (its brief, p. 97), while, like the appellate court, refusing to discuss our contention that the exclusion of this evidence was erroneous.

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derstood under difficult circumstances by an impatient Committee.

This also answers the government's second argument with respect to whether a "willful default" was committed (its brief, p. 95). Whether or not the Committee ordered petitioner to be sworn "regardless" of his desire to object — an hypothesis inconsistent with the suggestion that the Committee never appreciated his desire — nevertheless, the jury might have found under proper instructions, and especially if the excluded evidence had been admitted, that petitioner did not intend to disregard even the "order regardless," but was still attempting to explain, in the face of a misunderstanding of his purpose, that he merely wished to state an objection. In other words, the jury might have found not that petitioner was "willfully obdurate," but that he had simply been cut off while trying to explain his position.

IV. THE AFFIDAVIT OF BIAS AND PREJUDICE.

A. The Affidavit Was Substantively Sufficient.

In *Berger v. United States*, 255 U. S. 22, 33, 34, the test laid down for the sufficiency of an affidavit of bias and prejudice was whether the reasons assigned "give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment."

While, perforce, accepting the *Berger* case as authoritative, the government's argument in fact applies not a test of "fair support" of a "bent of mind," but rather a test of whether the facts alleged prove bias beyond doubt. Thus it repeatedly states that the allegations of the affidavit do not "*show*" personal prejudice (its brief, pp. 71, 72, 74, 75) and they do "not, of course, *prove* bias" (*id.*, p. 73).

The government also relies on judicial practices of voluntary disqualification, and asserts that this Court must assume that all members of the judiciary have "intellec-

tual discipline" (*id.*, pp. 72, 77). But if reliance is to be on voluntary disqualification, it is impossible to understand why Congress enacted a compulsory disqualification statute. Moreover, the statute was designed to preserve the confidence of the public in our judiciary not the self-confidence of the judiciary itself. The test is not, therefore, what this Court may think or assume, but what the lay affiant, who presumably is not cognizant with the niceties of voluntary disqualification, may reasonably believe. *Cf. Hurd v. Letts*, 152 F. (2d) 121, 122, that the test is whether "a sane and reasonable mind might fairly infer personal bias or prejudice on the part of the judge." We assert that a layman may reasonably believe that one who has investigated a case may not be a wholly unbiased judge in a prosecution growing out of the same investigation. Judges themselves may think otherwise, but, as Justice Prettyman pointed out in his dissent, that is irrelevant. In fact, Congress itself agrees with our hypothetical layman, as appears from section 5(c) of the Administrative Procedure Act (see our principal brief, p. 63).

The government reads the affidavit as not *necessarily* alleging that Justice Holtzoff actually participated in investigating the petitioner or even that he *necessarily* knew about the investigation. This reading is, we insist, technical, formalistic, and contrary to the manifest meaning of the affidavit, which is that Justice Holtzoff participated in investigations of petitioner and other Communists. The question is not what the allegations "necesarily" mean, but, in the light of the statutory policy, what they reasonably do mean. As we have pointed out, Justice Holtzoff himself and the majority and minority below unhesitatingly read the affidavit as charging actual participation. But even if the government is right in its quibbling over the meaning of the affidavit's phraseology, its conclusion is erroneous. At most the government's interpretation is that petitioner's belief was based on an inference rather than on a personal, actual knowledge of the

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full ultimate facts. But most human beliefs, including those on which people act on matters of utmost personal importance, are based on inferences, not on actual knowledge of the facts inferred. The *Berger* case itself expressly held (at 35) that the facts need not be personally known but can be alleged on information and belief. If the belief was based on inference, the only inquiry, if any, is whether the inference is reasonable, and such is surely the case here. Finally, we suggest to the government that one who believes something *must have* happened (its brief, p. 73) also believes it *did* happen.

The government's explanation of the difference between "personal" and "non-personal" bias is to us wholly obscure, nor, admittedly, is it relevant to those allegations of the affidavit which deal with Justice Holtzoff's connection with investigating the petitioner. It is plain, however, that the affidavit, if fairly read, alleges a hatred of individuals who are Communists, and not merely a dislike of their ideology. It thus comes within the holding in the *Berger* case as to these allegations as well.

B. The Affidavit Was Timely.

The government asserts that the filing of the affidavit was not timely for the following reasons:

(1) That although the identity of the trial judge was learned only on May 20, counsel for petitioner were delinquent in reserving decision to May 23, pending investigation and consideration in the meantime, because the trial had originally been set for May 26 (brief, p. 78).

(2) That although no decision had been made to file the affidavit, it nevertheless was incumbent on counsel to inform the trial court that they were thinking about possibly doing so (brief, p. 79).

(3) While chief trial counsel was unavailable because of the death of his brother, other counsel were obliged

to ignore his absence and proceed without benefit of his participation (brief, p. 79).

(4) That petitioner was "not warranted in waiting until a judge has decided certain issues against him before determining whether to seek to disqualify the judge" (brief, p. 80).

The first three of these propositions largely answer themselves. The original decision that two days might be necessary for checking and determining whether or not to file was obviously not unreasonable. The suggestion that although no decision had been made to file, counsel should nevertheless inform the trial court of the possibility can only be characterized as fantastic. No trial counsel who considered the interests of his client would ever adopt such a procedure, which might needlessly antagonize the trial judge. The further suggestion that other counsel should ignore the necessary absence of the chief trial counsel is equally unrealistic and contrary to the mores of the bar.

The government's last proposition is a generality whose accuracy we do not dispute, but it is not applicable here. It is clear that on May 23, when Justice Holtzoff ruled on the motions, counsel had not decided, and had not had adequate opportunity to decide, whether or not to file the affidavit. There is no basis for the government's invidious suggestion that counsel were withholding decision until they saw how Justice Holtzoff would rule. Nor is the government correct in urging that insufficient time to investigate and consider somehow becomes sufficient because a motion is pending. Such an argument is irrational on its face and is also contrary to the decided cases. *Morris v. United States*, 26 F. (2d) 444; *Barsky v. Holtzoff*, App. D.C., April Term, 1947, Misc. 126.

The government also obliquely suggests that the affidavit was filed for dilatory purposes. This intimation too is wholly without foundation, and the record demonstrates

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that the contrary was true. When the affidavit was filed on May 29, the trial had been set for June 4, six days later. As Justice Prettyman pointed out, if the trial judge had acted on it promptly, there was no reason why another judge could not have been assigned by the date of trial. This was as apparent to counsel for the petitioner as it was to Justice Prettyman. They had no reason to expect that if Justice Holtzoff disqualified himself, it would have delayed the trial for even a single day. By this we do not mean to concede that a defendant may not file an affidavit, if as a result of such filing a delay may be caused. It appears to us that the policy of the disqualification statute must be respected by the judiciary even if, as a result, a trial is delayed for a day or even a week. But in the present case, it is clear that there was no reason to anticipate a delay, and the introduction of the subject of delay only causes confusion. The Government's position is thus fully in accord with the policy of many of the lower courts to nullify the statute by interpretation. Frank, *Disqualification of Judges,* 56 Yale L. J. 605, 629.

V. THE PETITIONER DID NOT RECEIVE A FAIR TRIAL.

The government argues that the petitioner did receive a fair trial, but in the course of its discussion it ignores the chief points made in our brief and misstates others. Thus it ignores completely, as did the appellate court below, the trial judge's inconsistent rulings on evidence (see our principal brief, pp. 84-85), his violation of Rule 30 of the Rules of Criminal Procedure (our brief, pp. 86-87), and his direction of a verdict of guilty (our brief, pp. 85-86).

The government also states that "since the reprimands [of trial counsel] were administered outside of the hearing of the jury, any impression of hostility on the part

of the judge toward petitioner or his counsel was carefully avoided" (brief, p. 103). This statement is utterly and inexplicably false. Only one of the numerous reprimands (R. 51, 52) was administered out of the presence of the jury. Both before and after the one reprimand which was made outside the presence of the jury, and in which the trial judge recognized that reprimands in the jury's presence were prejudicial, the trial judge reprimanded counsel *in the presence of the jury* on at least eight sepa- occasions, as fully set out in our principal brief, pp. 72-81. These rebukes were neither deserved nor temperately couched.

The government also asserts (brief, p. 100) that we were inaccurate in stating that the trial judge's refusal to entertain offers of proof was an illustration that "he exacted retribution for fancied slights." But the trial judge himself expressly put his refusal to entertain the offer of proof on the ground that counsel could not "change back and forth" "in the light of the statement made by defense counsel" (see pp. 79-80 of our principal brief). The government further justifies the trial judge's refusal to entertain offers of proof on the trial judge's additional ground that he had previously ruled out an entire class of evidence. Further, says the government, the trial judge showed patience in the face of persistent efforts of counsel to introduce evidence that the trial judge had already ruled was irrelevant. As an example, the government says that although the trial court had ruled that reliance on advice of counsel was not a defense to a charge of willful default, trial counsel repeatedly attempted to introduce such evidence (government brief, pp. 100-101). Nothing in the record supports these statements.

What counsel did try to introduce into evidence, as to which the trial court even refused to listen to offers of proof, was evidence that under the Committee's practice counsel would not be permitted to make a legal objection, and that therefore counsel had advised petitioner that he,

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himself, should present the legal objection before the committee. Not only is this evidence completely removed from the proposition that advice of counsel eliminates willfulness, but it is also clear that if the trial judge had been willing to listen to the offer of proof he might have considered that the evidence so offered was relevant. Thus government counsel below considered it important to stress to the jury that petitioner had counsel present to make any legal objection (R. 165), the appellate court below considered it "important to note that appellant was accompanied to the hearing by his legal counsel" (R. 239), the government considers the presence of counsel a factor which it is important to recite in its brief (p. 97), and indeed even the trial court considered the presence of counsel at the hearing to be of significance (R. 75). In all these instances, the presence of counsel was considered to be significant against the petitioner as indicating that if the making of an objection had been sincerely intended his counsel would have made it. It must, therefore, have been relevant for petitioner to explain away this damaging inference by showing that his counsel would not have been permitted to make a legal objection and that she had so informed petitioner and instructed him to make his own legal objection. It is even conceivable that if the trial judge had permitted counsel to indicate that such was the nature of the evidence offered, he might have admitted it. Perhaps the moral is that a trial judge does not always know what counsel wishes to say so that he can reject a contention without even hearing it.[8] Likewise, it is hardly appropriate for the government to argue that the trial judge was correct in refusing to permit the making of offers of proof because the evidence which petitioner sought to introduce was irrelevant. The government is no more entitled to practice the arts of clairvoy-

[8] The trial judge showed similar clairvoyance in rejecting counsel's arguments for judgment of acquittal without benefit of hearing them (R. 152-155).

ance than was the trial judge, and we have shown that in fact the evidence we sought to introduce was relevant by any standard and was not on a subject-matter evidence of which had already been excluded.

Petitioner argued in his brief (pp. 81-84) that it was error for the trial judge to take over the prosecution and continually interpose his own objections to the conduct of the trial by the defense. The government offers the irrelevant answer that although the trial judge made adverse rulings to the petitioner, it also made adverse rulings to the prosecution (brief, p. 104). But we made no contention that the number of adverse rulings by themselves showed hostility. It is typical of the government's brief that it ignores the contentions made by petitioner, and refutes contentions not made.

Finally, the government says: "Although the trial may not have attained the ideal of judicial decorum in which friction between counsel and court is wholly absent, no substantial prejudice to the petitioner is perceptible," because "there was no substantial conflict in the evidence as to the essential points that were required to be submitted to the jury" (brief, p. 104).

This argument has point only if there were nothing for the jury to decide. But juries do not merely resolve conflicts in evidence, they must resolve conflicts in interpreting even uncontradicted evidence. In this case, the jury had to decide whether the evidence showed beyond a reasonable doubt that petitioner had refused to be sworn, as distinguished from merely attempting to make a legal objection, and whether in any event this refusal was willful. The evidence was not all so one-sided and unequivocal that this issue was not to be submitted to the jury, and only the jury could decide, and this only by a process of inference, whether any refusal was "willful."[9] Indeed,

[9] See R. 153, where the trial judge himself said that "the question of wilfulness is a question of fact for the jury."

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the government, in urging that it was not error to exclude some evidence bearing on the subject, argued that the trial court did admit some (its brief, p. 94). In making its decision on this point, the jury was undoubtedly influenced by the hostility of the trial judge, manifested in their presence. Moreover, under our system of jurisprudence, no matter how one-sided the evidence, a defendant is entitled to have a jury decide his guilt or innocence thereon impartially and uninfluenced by the judge's hostility. In addition, it is not the jury which sentences, but the judge.

In view of the popular excitement against Communists generally and petitioner specifically, this case, if ever there was one, required the trial judge to seek to realize the "ideal of judicial decorum." It is plain that he attempted nothing of the sort, and the government concedes that this ideal was not in fact reached.

Finally, it is ironic that the government attempts to save the court's conduct on the grounds that the jury issue was narrow, since it was the court's own errors in refusing appropriate instructions and excluding relevant evidence which narrowed the jury's function. Perhaps the government means that the court's conduct in prejudicing the jury was of no consequence because all possible damage was accomplished by his directing a verdict of guilty (see our principal brief, pp. 85, ff.). But then, at least, petitioner is entitled to a reversal for the direction. The government, however, adopts the discreet course of completely ignoring the issue of the directed verdict.

VI. THE TRIAL COURT ERRONEOUSLY INTERPRETED "WILLFULLY" IN THE STATUTE.

The government urges upon this Court the argument that the two clauses of the statute, the first of which contains the word "willfully," and the second of which omits

it, have precisely the same meaning. This concept is a difficult one to comprehend, since it concludes that an intentional use of contrasting phraseology in adjacent clauses reveals a purpose to give those clauses the same meaning. The argument is not only illogical, but it ignores completely the statement made with regard to this statute in *United States v. Murdock*, 290 U. S. 389, 397: "Two distinct offenses are described in the disjunctive, and in only one of them [the one presently involved] is willfulness an element."

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 255

GERHART EISLER, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority (R. 233-240) and dissenting (R. 241-245) opinions in the Court of Appeals have not yet been reported. The opinions of the district court striking the affidavit of prejudice (R. 4-6) and denying motions for a new trial and in arrest of judgment (R. 205-208) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 14, 1948 (R. 246). The order denying a petition for rehearing was entered July 17, 1948 (R. 250). On August 31, 1948, within the time as extended by Mr. Chief Justice Vinson (R. 252), the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended (now 28 U. S. C. 1254(1)). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the affidavit of bias and prejudice which was filed against the trial judge was legally sufficient to disqualify him.

2. Whether the court's conduct of the trial was fair.

3. Whether petitioner, who refused to be sworn and to testify before the House Committee on Un-American Activities except upon condition that he be allowed to make a preliminary statement, has standing to challenge the constitutionality of the Committee's authority; and, if so, whether the House Resolution which authorized the committee and empowered it to compel testimony is constitutional.

4. Whether, in a prosecution of the petitioner for willful default, the evidence was sufficient to support the allegation in the indictment that peti-

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tioner was summoned to give testimony upon a matter under inquiry by the Committee.

5. Whether a witness in a congressional inquiry can insist that he be allowed to state objections to his appearance in advance of taking oath and testifying.

6. Whether a "willful default" within the meaning of R. S. 102 (2 U. S. C. 192) requires an evil or bad purpose in addition to deliberate and intentional conduct.

7. Whether, as an alien enemy in the custody of immigration officials, petitioner was exempt from the duty to testify in a legislative inquiry.

STATUTES AND RESOLUTION INVOLVED

Section 21 of the Judicial Code (28 U. S. C. [1946 ed.], 25)[1] provided, as of the time involved herein, as follows:

> Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in section 24 of this title, or chosen in the manner prescribed in section 27

[1] Now 28 U. S. C. 144. Except for minor changes in arrangement and phraseology the new section is identical.

of this title, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action.

R. S. 102, as amended (2 U. S. C. 192) provides:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

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House of Representatives Rule XI(q) (2), as amended by Section 121 (b) of the Legislative Reorganization Act of 1946, c. 753, 60 Stat. 812, 828, and thereafter adopted by the House of Representatives (H. Res. No. 5, 80th Cong., 1st Sess.), provides:

> The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.
>
> The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.
>
> For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such

testimony, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.

STATEMENT

On February 27, 1947, petitioner was indicted in the United States District Court for the District of Columbia for a violation of R. S. 102. The indictment (R. 214-215) charged that, having been summoned as a witness to give testimony before the House Committee on Un-American Activities, he appeared but refused to be sworn to testify and thereby willfully defaulted.

Petitioner filed an affidavit of bias and prejudice to disqualify Associate Justice Holtzoff of the District Court of the United States for the District of Columbia, which in substance, asserted that (1) prior to his appointment to the bench, Judge Holtzoff had been legal advisor to the F.B.I. and had participated in investigations of aliens and Communists, which necessarily included petitioner (an alien Communist); (2) in connection with his previous duties, Judge Holtzoff had sponsored anti-Communist legislation; (3) he had publicly expressed admiration and close friendship for the Director of the Federal Bureau of Investigation, who "is and has been violently anti-Communist"; and (4) in 1940, Judge Holtzoff had defended the

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propriety of a compilation of information concerning Communists. The affidavit recited that on or about May 20, 1947, immediately upon learning that Judge Holtzoff would preside at the trial, petitioner had communicated his disapproval to counsel but that a conference with co-counsel on the matter was delayed until May 27 because of bereavement of one of his counsel over the death of a brother. The affidavit was executed May 28 and was filed May 29. (R. 222-226.) On June 4, 1947, Judge Holtzoff struck the affidavit as insufficient on its face and untimely (R. 4-6). The trial began before a jury on June 4, and the following evidence was adduced:

At all pertinent times, the Committee on Un-American Activities was functioning pursuant to the House Resolution which established the Committee, delineated the scope of its activities and defined its powers. The Committee was empowered to administer oaths to witnesses (R. 13) and it was the practice at Committee hearings for all witnesses to be sworn, as the "first step" in giving their testimony (R. 48).

On January 23, 1947, the Committee issued a subpoena directing petitioner to appear on February 6 before the Committee, "there to testify touching matters of inquiry committed to said Committee" (R. 22-23). The subpoena was served January 24, 1947 (R. 22). On February 4, petitioner was taken into custody as an enemy alien by Security

Officers of the Immigration and Naturalization Service, acting pursuant to executive order. While in such custody, he was brought to the Committee's hearing room on February 6 (R. 30), and the following colloquy then took place (R. 234-235; cf R. 43-47):

> The Chairman.[2] Now, Mr. Stripling, call your first witness.
>
> Mr. Stripling. Mr. Gerhart Eisler, take the stand.
>
> Mr. Eisler. I am not going to take the stand.
>
> Mr. Stripling. Do you have counsel with you?
>
> Mr. Eisler. Yes.
>
> Mr. Stripling. I suggest that the witness be permitted counsel.
>
> Mr. Chairman. Mr. Eisler, will you raise your right hand?
>
> Mr. Eisler. No. Before I take the oath—
>
> Mr. Stripling. Mr. Chairman—
>
> Mr. Eisler. I have the floor now.
>
> Mr. Stripling. I think, Mr. Chairman, you should make your preliminary remarks at this time, before Mr. Eisler makes any statement.
>
> Mr. Chairman. Sit down, Mr. Eisler. Now, Mr. Eisler, you will be sworn in. Raise your right hand.
>
> Mr. Eisler. No.

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[2] The Chairman of the Committee was Representative J. Parnell Thomas (R. 13-14), Mr. Stripling was the Committee's Chief Investigator (R. 26), and Messrs. Mundt and Rankin were members of the Committee.

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The Chairman. Mr. Eisler, in the first place, you want to remember that you are a guest of this Nation.

Mr. Eisler. I am not treated as a guest.

The Chairman. This committee—

Mr. Eisler. I am a political prisoner in the United States.

The Chairman. Just a minute. Will you please be sworn in?

Mr. Eisler. You will not swear me in before you hear a few remarks.

The Chairman. No; there will be no remarks.

Mr. Eisler. Then there will be no hearing with me.

The Chairman. You refuse to be sworn in? Do you refuse to be sworn in, Mr. Eisler?

Mr. Eisler. I am ready to answer all questions, to tell my side.

The Chairman. That is not the question. Do you refuse to be sworn in? All Right.

Mr. Eisler. I am ready to answer all questions.

The Chairman. Mr. Stripling, call the next witness. The committee will come to order, please. What is the pleasure of the committee?

Mr. Stripling. Mr. Chairman, I think that the witness should be silent, or take the stand or be removed from the room, one or the other, until this matter is determined.

Mr. Mundt. Mr. Chairman, suppose you ask him again whether he refuses to be sworn.

Mr. Rankin. Not "sworn in," but to be sworn.

The Chairman. Mr. Eisler, do you refuse, again, to be sworn?

Mr. Eisler. I have never refused to be sworn in. I came here as a political prisoner. I want to make a few remarks, only 3 minutes, before I be sworn in, and answer your questions, and make my statement. It is 3 minutes.

The Chairman. I said that I would permit you to make your statement when the committee was through asking questions. After the committee is through asking questions, and your remarks are pertinent to the investigation, why it will be agreeable to the committee. But first you have to be sworn in.

Mr. Eisler. That is where you are mistaken. I have to do nothing. A political prisoner has to do nothing.

The Chairman. Then you refuse to be sworn.

Mr. Eisler. I do not refuse to be sworn. I want only 3 minutes. Three minutes to make a statement.

Mr. Chairman. We will give you those 3 minutes when you are sworn.

Mr. Eisler. I want to speak before I am sworn.

The Chairman then dismissed petitioner (R. 28).

Petitioner testified in his own behalf at the trial that he had not refused to testify before the Committee but had insisted, as a condition precedent to such testimony, that he be permitted "to make a few remarks in connection with my arrest" (R.

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130), "because I had objection against the whole, what I considered unlawful proceedings of this Committee against my person" (R. 133).

Petitioner was found guilty and he was sentenced to imprisonment for a term of one year and to pay a fine of $1,000 (R. 229). Upon appeal to the United States Court of Appeals for the District of Columbia, the judgment was affirmed, one judge dissenting (R. 233-245).

ARGUMENT

1. Petitioner contends (Pet. 15-18) that the refusal of the trial judge to disqualify himself nullified the statutory directive in 28 U. S. C. (1946 ed.) 25. It is well settled, of course, that the facts alleged in an affidavit of bias or prejudice cannot be controverted. *Berger* v. *United States,* 255 U. S. 22. The trial judge recognized this limitation, and his incidental observation that "I have no recollection of ever hearing of the defendant in this case until I saw his name in the newspapers several months ago" was made only after he had disapproved the application on the hypothesis that the facts recited therein were true (R. 3-6). The Court of Appeals likewise properly confined itself to determining whether on its face the affidavit asserted facts which fairly supported the charge that Judge Holtzoff had a bent of mind which might have prevented or impeded impartiality of judgment and whether the application was filed within the time prescribed by the statute. Upon those criteria of

sufficiency, which have been approved by this Court (*Berger* v. *United States, supra; Ex parte American Steel Barrel Co.*, 230 U. S. 35), the decision rejecting the attempted recusation was affirmed.

In appraising the sufficiency of the allegations of fact which are uncontrovertible, it is necessary to strip the affidavit of argument and innuendo. According to petitioner (Pet. 5), the affidavit recited that Judge Holtzoff had, while he was legal adviser to the F.B.I., participated in an F.B.I. investigation of him. This, we submit, is a misleading paraphrase of the affidavit. The affiant carefully refrained, presumably because such was not the fact, from asserting that any investigation in which Judge Holtzoff participated concerned petitioner personally. The affidavit states merely that Judge Holtzoff "figured in an important capacity" in a general investigation "directed against aliens and communists, which necessarily included myself" (R. 224), and that an alleged investigation of petitioner's activities by the F.B.I. "must have come to Justice Holtzoff's attention during the period while he performed such duties." (R. 222-223.) It is patent that the quoted phrases are argumentative inferences, not assertions of fact. An investigation directed generally against aliens and communists does not necessarily embrace every individual who might fall into those categories; nor does a legal adviser to the F.B.I. necessarily learn of the activities of each individual who is investi-

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gated. We are left, therefore, with the basic factual assertion that, as legal adviser to the F.B.I., Judge Holtzoff was an important participant "in advising and aiding and determining the policy, nature, scope and objectives of" an investigation into the activities of aliens and Communists (R. 224). It should be noted also that Judge Holtzoff's participation is not alleged to have extended to reviewing, approving, or acting upon any disclosures or reports resulting from the investigation. The other allegations of fact are concerned with (1) Judge Holtzoff's sponsorship and support of anti-communist legislation before the 77th Congress, 1st session (1941), in his capacity as a government official; (2) his defense in 1940 of the propriety of compiling information concerning communists and others holding unorthodox political views; and (3) his close friendship with and admiration for the Director of the F.B.I., a "violent anti-communist." (R. 222-224.)

Apart from the imputation of bias or belief by association, the affidavit asserts nothing more, in essence, than that Judge Holtzoff, in his official capacity prior to his appointment to the bench, advised the F.B.I. and Congress with respect to measures dealing with communists and aliens. That fact, we submit, is inadequate to support the charge that he held a personal bias or prejudice against petitioner. The word "personal" in the recusation statute is not tautological. As the Court of Appeals correctly stated, "impersonal prejudice

resulting from a judge's background or experience is not, in our opinion, within the purview of the statute" (R. 237). *Price* v. *Johnston,* 125 F. 2d 806 (C. C. A. 9), certiorari denied, 316 U. S. 677; *Craven* v. *United States,* 22 F. 2d 605 (C. C. A. 1), certiorari denied, 276 U. S. 627; *Beland* v. *United States,* 117 F. 2d 958 (C. C. A. 5), certiorari denied, 313 U. S. 585.

Moreover, this case is not concerned with whether petitioner was or is a subversive communist or alien. The issue is simply whether he willfully defaulted in refusing to be sworn and to testify before a legislative committee. Absence of bias and prejudice, whether considered in relation to the subject matter or to the defendant, does not mean the total absence of preconceptions in the mind of a judge concerning the nature, objectives, and treatment of communism and communists, as gathered from his background and associations. As this Court observed in rejecting a similar attack upon the impartiality of an administrative official (*United States* v. *Morgan,* 313 U. S. 409, 421):

> Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.

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And only at the last Term this Court decided that members of a regulatory commission were not disqualified from determining a cause by reason of having formed a generalized opinion in the field. *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 700-701.[3] No less must it be assumed that, upon assumption of judicial duties, a

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[3] "Marquette introduced numerous exhibits intended to support its charges. In the main these exhibits were copies of the Commission's reports made to Congress or to the President, as required by § 6 of the Trade Commission Act. 15 U. S. C. § 46. These reports, as well as the testimony given by members of the Commission before congressional committees, make it clear that long before the filing of this complaint the members of the Commission at that time, or at least some of them, were of the opinion that the operation of the multiple basing point system as they had studied it was the equivalent of a price fixing restraint of trade in violation of the Sherman Act. We therefore decide this contention, as did the Circuit Court of Appeals, on the assumption that such an opinion had been formed by the entire membership of the Commission as a result of its prior official investigations. But we also agree with that court's holding that this belief did not disqualify the Commission.

"In the first place, the fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices. Here, in contrast to the Commission's investigations, members of the cement industry were legally authorized participants in the hearings. They produced evidence—volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities."

government executive officer or legislator is capable of administering even-handed justice uninhibited by influences of governmental policy in which he formerly participated.

It is the duty of a trial judge not to permit the use of an affidavit of bias and prejudice as a means of accomplishing delay and otherwise embarrassing the administration of justice. *Ex parte American Steel Barrel Co.*, 230 U. S. 35. The statute requires such an affidavit to be filed "not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time." In view of the practice in the District Court for the District of Columbia of sitting in continuous session, except in the summer, with the several judges serving in rotation or upon assignment, the alternative test of "due diligence" is applied there (see R. 242). The application by petitioner to disqualify the trial judge was not made until after the judge had denied motions for dismissal of the indictment and for a bill of particulars and had granted two continuances of the trial date. At least nine days had passed from the time the actual designation of Judge Holtzoff as the trial judge became known to petitioner (R. 225), three days had elapsed since the date originally set for the trial, and only six days remained before commencement of the trial. (R. 231.) In these circumstances, the trial court and the Court of Appeals cannot be said to have abused their dis-

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cretion in determining that the application had not been filed with the requisite degree of diligence and hence was not timely.

2. The trial judge is accused of having displayed active hostility and prejudice toward petitioner and his counsel throughout the trial by his rulings, by assuming the role of prosecutor, by one-sided questioning of witnesses, and by harrassing counsel (Pet. 18). The record does not support this accusation. To the contrary, it appears that the trial was conducted in a judicious and orderly manner and that the judge consistently and impartially attempted to confine the trial to the pertinent issues. His intervention in the examination of witnesses did not extend beyond the scope of his duty to elicit the truth and to clarify the case for the benefit of the jurors. See *Glasser* v. *United States*, 315 U. S. 60, 82; *Griffin* v. *United States*, 164 F. 2d 903 (App. D. C.), certiorari denied, 333 U. S. 857; *Simon* v. *United States*, 123 F. 2d 80 (C. C. A. 4), certiorari denied, 314 U. S. 694.

If the trial judge construed the issues too narrowly to the prejudice of petitioner, his rulings were, of course, subject to correction upon appeal. His attempt to confine the evidence to the issues as he construed and understood them is not, however, a demonstration of prejudice and hostility. Impartiality does not demand that the rulings in favor of one side shall be arithmetically equal to rulings for the other. As the Court of Appeals

concluded after a careful examination of the record, petitioner "persistently attempted to adduce immaterial and irrelevant evidence, and the fact that a great number of rulings adverse to appellant were naturally elicited from the trial court contributes nothing to an assertion of hostility and bias" (R. 240).

Only an insignificant portion of the trial was devoted to the questioning of witnesses by the court. Indeed, the few questions upon which petitioner relies as showing that the judge "assumed the role of the prosecutor and conducted a hostile cross-examination" (Pet. 8, referring to R. 131, 132, 143, 145, 146) demonstrate, to the contrary, that the judge properly exercised his discretion in supplementing efforts of counsel in order to clarify the evidence for the benefit of the jury.

The complaint that the trial judge "continuously reprimanded and harassed defense counsel" (Pet. 6) is no more worthy. Not only is there no showing that petitioner was thereby prevented from introducing all the evidence that was properly available to him, but an examination of the record reveals that such rebukes and admonitions as were administered were couched in temperate and reserved language. It is, of course, impossible fully to glean from the printed word the tone or demeanor of either counsel or court, but the record does not disclose the existence of any such spirited controversy between them as might have intimi-

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dated counsel or given to the jury the impression of advocacy on the part of the judge.

3. Petitioner attacks the constitutional validity of the authorization pursuant to which the Committee on Un-American Activities summoned him to testify. He has correctly noted (Pet. 27) that the identical issue has been twice presented to this Court and that certiorari has been denied in both instances. *Josephson* v. *United States,* 333 U. S. 838, rehearing denied, 333 U. S. 858; *Barsky* v. *United States,* 334 U. S. 843.

Here, as in the *Josephson* case, it is questionable whether petitioner has standing to challenge the constitutionality of the Committee's authority in view of his refusal to submit to any and all interrogation except on conditions which, as we shall show (*infra,* pp. 21-24), he had no right to impose. In our brief in opposition in the *Josephson* case (No. 535, Oct. T. 1947), we pointed out (pp. 7-8) that Josephson, like petitioner here, had chosen to attack the legality of the Committee's enabling resolution before any of his rights were infringed or threatened by the Committee, and, therefore, had no standing to raise the constitutional issue.

Assuming, however, that petitioner is in a position to raise the question, he urges that the issue of the constitutionality of the Committee's authority is one of extreme public importance which "requires the consideration of this Court" (Pet. 28). On that question, we deem it unnecessary to

attempt to add to what has already been said in the opinions of the Courts of Appeals for the Second Circuit and the District of Columbia in the *Josephson* (165 F. 2d 82) and *Barsky* (167 F. 2d 241) cases and in our brief in opposition in the *Josephson* case.

4. The subpoena served upon petitioner called upon him to appear and testify "touching matters of inquiry committed to said Committee" (R. 23). The Committee was functioning throughout as a standing Committee of the House of Representatives pursuant to and in accordance with the resolution creating it (R. 13). The enabling resolution (*supra*, pp. 5-6) discloses the nature and scope of the inquiry and, in conjunction with the subpoena, disposes of petitioner's contention (Pet. 20-22) that the Government failed to prove that he was summoned to testify in a matter under inquiry before the Committee. Moreover, in view of the petitioner's refusal to submit to questioning, he cannot now complain that the prosecution failed to adduce evidence showing the specific questions which were contemplated by the Committee or to prove their pertinence to the inquiry. *McGrain* v. *Daugherty*, 273 U. S. 135, 160; *Josephson* v. *United States*, 165 F. 2d at 86-87. Nor is the alleged ulterior motive of the Committee in summoning this witness material. Suffice it to say that, since the subpoena on its face was issued pursuant to the Committee's authority, the motives of the Committee members

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are not matters for judicial cognizance. *Josephson* v. *United States, supra,* 165 F. 2d at 89.

5. Petitioner urges error in the exclusion of evidence with respect to the remarks which he intended to make to the Committee before he would consent to be sworn. The fact of the matter is, however, that evidence on this subject was admitted (R. 112, 130, 131, 133, 135, 138, 140; cf. R. 77, 159-160). For example, petitioner's wife testified that he had "prepared a small statement, or a few remarks, if you want to, which he wanted to make to protest his illegal arrest * * * instigated by the Un-American Activities Committee" (R. 112). Petitioner, in response to the question by his counsel "And what did you want to say?" testified, "Before I took the oath, I wanted to make a few remarks in connection with my arrest" (R. 130); and, again, in response to a question as to why he wished to make some remarks before he would be sworn, petitioner stated: "Because I had objection against the whole, what I considered unlawful proceedings of this Committee against my person" (R. 133). It is true that the trial court confined testimony concerning the proffered statement to a characterization or a summarization of its content and excluded evidence of the details. Detailed evidence in elaboration of petitioner's intended attack upon the Committee would have served merely to confuse the issue before the jury.

The admissibility of this evidence depended upon (1) its relevancy and materiality on the question whether a "default" occurred within the meaning of Section 102 of the Revised Statutes, and (2) its probative value on the question whether the default was "willful." We believe that petitioner's reasons for refusing to testify before the Committee have no bearing on the first question. The Committee, not the witness, determines its procedure. Conceding that such evidence may be admissible on the question of willfulness (although its probative value is slight since, as we shall show, a bad purpose is not required), petitioner's rights in having the jury consider the evidence were fully protected (*infra*, pp. 24-25).

The trial court properly refused petitioner's request to charge that he should be acquitted if he intended only to make a legal objection to the Committee's procedure and was otherwise willing to be sworn and to testify (Pet. 22). In effect, petitioner is contending that no default occurs unless and until a legislative committee grants the demand of a witness that he be allowed to make a statement of legal objections prior to taking the oath and testifying. But the exercise of judgment as to the manner of exercising its inquisitorial power, within constitutional limits, is entrusted to the Committee, not the witness. *Barry* v. *United States*, 279 U. S. 597; *Townsend* v. *United States*, 95 F. 2d 352 (App. D. C.), certiorari denied, 303

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U. S. 664. The Committee explicitly made known its mode of procedure to the petitioner (R. 43-47).

It is specious to argue that "default" does not include a refusal to be sworn (Pet. 23). The petitioner was summoned to "testify, etc." The word "testify" imports an oath or affirmation, which is the customary preliminary qualification to giving testimony. "It was decided very early by both House of Congress, that the power to compel information ought not to be used without the solemnity of an oath to the fact." Eberling, *Congressional Investigations*, p. 298. The oath is the customary first step in the reception of testimony by the Committee on Un-American Activities (R. 13-14). In principle, petitioner's refusal to accept this procedure was as much a frustration of his appearance as if he had walked out, without excuse, before the Committee's questions were fully answered. Cf. *Townsend* v. *United States, supra.* Petitioner did not object to taking an oath as such; indeed, he expressed his willingness to take an oath, with the proviso, however, that the Committee would accede to the conditions which he sought to impose.

No question of due process is presented. The Committee has discretion to determine how best to conduct its business with efficient dispatch. Petitioner was advised that an opportunity to make a statement would be afforded after he had testified but he refused to abide by that procedure (R. 47).

It is the prerogative of the Committee to determine the time and manner of such presentations lest the hearing be perverted by declarations having little relevance to the issue at hand. It has been well established since 1795 that Congressional Committees are not bound to follow principles or precedents of courts of law. Dimock, *Congressional Investigating Committees,* p. 153; cf. *People ex rel. Keeler* v. *McDonald,* 99 N. Y. 463.

6. The trial court charged the jury that the term "willfully," as used in Section 102 of the Revised Statutes, means a deliberate and intentional default, as distinguished from mere inadvertence or accident, and not necessarily that a default must be motivated by an evil or bad purpose; that the motivation is immaterial so long as the default was deliberate and intentional (R. 172). This instruction is identical with that which was approved in *Fields* v. *United States,* 164 F. 2d 97, 100 (App. D. C.), certiorari denied, 332 U. S. 851, which involved a similar default before a congressional committee. The majority and dissenting judges in the Court of Appeals agreed that the trial court's construction of the term "willful," in the context of this statute, was correct. Cf. *Sinclair* v. *United States,* 279 U. S. 263, 299.

The evidence of intentional and deliberate refusal to testify was so compelling that we fail to see how the jury could have failed to find the requisite "willfulness." In their deliberations they had be-

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fore them petitioner's version of the reasons for his refusal to be sworn and testify (see p. 21, *supra*). Indeed, the trial court supplemented his charge to emphasize petitioner's contention in this respect, repeating *verbatim* petitioner's own words, "because I had objection against the whole, what I considered unlawful proceedings of this committee against my person" (R. 177). Presumably, the jury gave this evidence the weight to which it was entitled. Moreover, the jury may have inferred that petitioner in fact intended, in the 3-minute period which he requested, to start reading the 20-page mimeographed statement. It contained the revealing preface: "In order to save your time when it comes to questioning, I shall tell you what I am going not to answer" (R. 148). Contumacy could hardly be more patent.

7. Petitioner came to this country in June 1941 on a transit visa (R. 114). In February 1947, about ten days after the Committee's subpoena was served upon him (R. 22), he was arrested by immigration officials under an executive warrant. The contention is now advanced (Pet. 25-26) that as an alien enemy in transit, detained in this country against his will, he could not be required to appear and testify before a Congressional committee.

The statute punishing a willful default applies without distinction to "every person" (*supra*, p. 4). The obligation to furnish legislative committees with such information and data as they are

constitutionally empowered to elicit is not peculiar to citizenship, and, therefore, petitioner was no less amenable than a citizen to obey the statute. Cf. *Carlisle* v. *United States*, 16 Wall. 147. Alien enemies, even those interned, have access to our courts. *Ex parte Kawato*, 317 U. S. 69, 73. They are entitled to the constitutional guaranties of the Bill of Rights in criminal proceedings even in time of war. *Von Moltke* v. *Gillies*, 332 U. S. 708. Other privileges and opportunities were afforded petitioner during his sojourn in this country. Correlatively, alien enemies cannot hold themselves above process in private or public litigation. Oppenheim's *International Law* (Rev. 6th ed. Lauterpacht), p. 253. We are referred to no authority in international law that affords petitioner an immunity from process of our Congress.

The argument that as an interned alien enemy, petitioner was a "prisoner of war" and, therefore, entitled under Article 5 of the Geneva Convention to refuse to answer any questions other than name, rank, and regimental number, is defective on several grounds, each independent of the other. First, there is no showing that petitioner was "interned" as an alien enemy. Second, the term "prisoner of war" in the context of the Geneva Convention, 47 Stat. 2021, is not applicable to petitioner who, far from being within the class of captured military personnel or those similarly situated for whom the protection of the Convention was contemplated (Dig. Op. J. A. G. (1912-1940) par. 2180a), was a

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civilian at liberty in this country throughout the period of hostilities. Finally, Article 5 of the Geneva Convention forbids coercion of prisoners to secure "information relative to the condition of their army or country." The protection afforded by Article 5 is obviously not germane to the inquiry for which petitioner was summoned.

The fact that petitioner was under arrest and in the custody of immigration officials at the time he appeared before the committee is without significance. As the Court of Appeals observed, that fact "did not mitigate his obligation to give testimony; the arrest, if actually unlawful as appellant contended, was a matter to be contested by appellant in a judicial proceeding if he so desired, and was irrelevant to the proceedings before the Committee" (R. 237).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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OCTOBER 1948.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 255

GERHART EISLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority (R. 233–240) and dissenting (R. 241–245) opinions in the Court of Appeals are reported at 170 F. 2d 273. The opinions of the district court striking the affidavit of prejudice (R. 4–6) and denying motions for a new trial and in arrest of judgment (R. 205–208) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 14, 1948 (R. 246), and a petition for rehearing was denied July 17, 1948 (R. 250). The petition for a writ of certiorari was filed on August 31, 1948, within the time as extended by Mr. Chief Justice Vinson (R. 252), and was granted November 8, 1948 (R. 253). The juris-

diction of this Court is conferred by 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the Resolution creating the Committee on Un-American Activities is Constitutional.

2. Whether the affidavit of bias and prejudice which was filed against the trial judge was timely and was legally sufficient to disqualify him.

3. Whether the court's conduct of the trial was fair.

4. Whether a "willful default" within the meaning of R. S. § 102 requires an evil or bad purpose in addition to deliberate and intentional conduct.

5. Whether the evidence was sufficient to show that petitioner was summoned to give testimony upon a matter committed to the Committee.

6. Whether petitioner was unlawfully denied the right to testify as to the contents of the statement he wished to make before being sworn.

7. Whether an alien involuntarily detained in this country on a transit visa is exempt from the duty to testify in a legislative inquiry.

8. Whether petitioner's arrest as an enemy alien gave him immunity from testifying as a prisoner of war.

9. Whether refusal to be sworn was a default under the statute.[1]

[1] This point is considered in note 5, p. 14, *infra*.

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STATUTES AND RESOLUTION INVOLVED

R. S. 102, as amended (2 U. S. C. 192), provides:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

Rule XI (q) of the Rules of the House of Representatives, as amended by Section 121 (b) of the Legislative Reorganization Act of 1946, c. 753, 60 Stat. 812, 823, 828, and thereafter adopted by the House of Representatives (H. Res. No. 5, 80th Cong., 1st Sess., 93 Cong. Rec. 38) provides:

RULE XI

Powers and Duties of Committees

* * * * *

> The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time

investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.

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Section 21 of the Judicial Code (28 U. S. C. (1946 ed.) (25)[2] provided, as of the time involved herein, as follows:

> Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in section 24 of this title, or chosen in the manner prescribed in section 27 of this title, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action.

[2] Now 28 U. S. C. 144. Except for minor changes in arrangement and the phraseology the new section is identical.

STATEMENT

On February 27, 1947, petitioner was indicted in the United States District Court for the District of Columbia for a violation of R. S. 102 (*supra*, p. 3). The indictment (R. 214–215) charged that petitioner was summoned as a witness to give testimony before the House Committee on Un-American Activities upon matters of inquiry committed to it by Public Law No. 601, section 121, of the 79th Congress, and H. Res. 5 of the House of Representatives, 80th Congress (*supra*, pp. 3–4); that he appeared and was directed to be sworn to testify upon such matters; and that he thereupon refused to be sworn to testify, thus willfully committing a default.

Petitioner filed an affidavit of bias and prejudice to disqualify Judge Alexander Holtzoff, who had been designated to preside at the trial, in which he expressed his belief that Judge Holtzoff had a personal bias and prejudice against him and in favor of the Government. The grounds which petitioner asserted in support of this belief may be summarized as follows (R. 222–225):

1. At the hearing of the Committee on Un-American Activities, from which arose the charge of willful default by petitioner, a report by J. Edgar Hoover, Director of the F. B. I., of an investigation of petitioner's activities over many years was incorporated in the record. "This report indicates strong personal bias and preju-

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dice against me. * * * I believe that this investigation of my activities must have come to Justice Holtzoff's attention" during the period, prior to his becoming a Judge in September 1945, while he performed duties as Special Assistant to the Attorney General assigned to the F. B. I. "His duties were concerned especially with the investigation by the F. B. I. into the activities of aliens and communists, into both of which categories I fall." Judge Holtzoff had been legal adviser to the F. B. I. at the time the investigation of petitioner was commenced and continued as such until September 1945. "Upon information and belief, he figured in an important capacity in advising, aiding and determining the policy, nature, scope and objectives of the investigation directed against aliens and communists, which necessarily included myself."

2. In 1940 Judge Holtzoff had stated that on the basis of numerous official contacts with the F. B. I., sometimes almost daily, and his close personal friendship with J. Edgar Hoover, he had an excellent opportunity to observe the daily operations of the F. B. I. at close range.

3. "In connection with his duties as United States attorney assigned to the F. B. I., Justice Holtzoff advised J. Edgar Hoover as to steps and actions to be taken against alien communists, such as myself." He sponsored and supported legislation before the 77th Congress, 1st Session, permitting the deportation of aliens and their con-

finement in concentration camps upon proof of membership in the Communist Party. He appeared as the representative of the F. B. I. on many occasions and defended the F. B. I. in such a way that he was publicly and responsibly charged with distorting facts.

4. Judge Holtzoff had publicly expressed close friendship with and praise for J. Edgar Hoover, who "is and has been violently anti-Communist and, upon information and belief, has referred to Communists as 'vermin' and 'rats' and, on occasion has referred to Communism as 'red Fascism,' 'a malignant growth' and 'a virulent poison'." Judge Holtzoff had sponsored legislative and other activities that reflected those views of Mr. Hoover.

5. In 1940, Judge Holtzoff had defended the propriety of a compilation of intelligence concerning Communists and others whose political views differed from those deemed proper by the F. B. I.

The affidavit also recited that on or about May 20, 1947, immediately upon learning that Judge Holtzoff would preside at the trial, petitioner had communicated his disapproval to one of his counsel, A. J. Isserman, but a conference with co-counsel on the matter was delayed until May 27 because of Mr. Isserman's bereavement by the death of a brother. The affidavit was executed by petitioner in New York City on May 28 and was accompanied by the certificate of Carol King, one

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of his counsel of record, that the application and affidavit were made in good faith and not for the purpose of hindrance or delay. It was filed May 29 (R. 226).

On June 4, 1947, at the commencement of the trial, Judge Holtzoff struck the affidavit for the reasons that (1) it was filed too late; (2) the facts alleged did not meet the standard prescribed by the disqualification statute; and (3) the certificate accompanying the affidavit had not been made by a member of the bar of the District of Columbia [3] (R. 4–6).

At the trial the following evidence was adduced:

On January 23, 1947, the Committee on Un-American Activities issued a subpoena directing petitioner to appear before it on February 6, "there to testify touching matters of inquiry

[3] In *Berger* v. *United States*, 255 U. S. 22, 33, 35, this Court stated that one of the precautions against abuse of the affidavit of bias and prejudice lies in the requirement of an accompanying certificate of counsel, with the penalty of disbarment for connivance in a false affidavit. Carol King, who executed the certificate in the instant case, was a member of the New York bar and had been admitted *pro hac vice* to the bar of the trial court. Her certificate was considered insufficient because she did not bear the type of direct responsibility which is imposed upon members of the bar of the particular court in which the affidavit is filed (R. 5–6). Cf. *Currin* v. *Nourse*, 74 F. 2d 273 (C. A. 8); *Morse* v. *Lewis*, 54 F. 2d 1027, 1032 (C. A. 4), certiorari denied, 286 U. S. 557. David Rein, who had entered his appearance for petitioner, was a member of the bar of the trial court (R. 5), and was available, therefore, to execute the certificate.

committed to said Committee" (R. 22–23). The subpoena was served January 24, 1947 (R. 22). On February 4, petitioner was taken into custody as an enemy alien by representatives of the Immigration and Naturalization Service, acting pursuant to a Presidential Order (R. 82–83). While in such custody, he was taken to the Committee's hearing room on February 6 (R. 30), and the following colloquy ensued (R. 43–47):

> The CHAIRMAN.[4] Now, Mr. Stripling, call your first witness.
>
> Mr. STRIPLING. Mr. Gerhart Eisler, take the stand.
>
> Mr. EISLER. I am not going to take the stand.
>
> Mr. STRIPLING. Do you have counsel with you?
>
> Mr. EISLER. Yes.
>
> Mr. STRIPLING. I suggest that the witness be permitted counsel.
>
> The CHAIRMAN. Mr. Eisler, will you raise your right hand?
>
> Mr. EISLER. No. Before I take the oath——
>
> Mr. STRIPLING. Mr. Chairman——
>
> Mr. EISLER. I have the floor now.
>
> Mr. STRIPLING. I think, Mr. Chairman, you should make your preliminary remarks at this time, before Mr. Eisler makes any statement.

[4] The Chairman of the Committee was Representative J. Parnell Thomas (R. 13–14), and Messrs. Mundt and Rankin were members of the Committee. Mr. Stripling was the Committee's Chief Investigator (R. 26).

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The CHAIRMAN. Sit down, Mr. Eisler. Now, Mr. Eisler, you will be sworn in. Raise your right hand.

Mr. EISLER. No.

The CHAIRMAN. Mr. Eisler, in the first place, you want to remember that you are a guest of this Nation.

Mr. EISLER. I am not treated as a guest.

The CHAIRMAN. This committee——

Mr. EISLER. I am a political prisoner in the United States.

The CHAIRMAN. Just a minute. Will you please be sworn in?

Mr. EISLER. You will not swear me in before you hear a few remarks.

The CHAIRMAN. No; there will be no remarks.

Mr. EISLER. Then there will be no hearing with me.

The CHAIRMAN. You refuse to be sworn in? Do you refuse to be sworn in, Mr. Eisler?

Mr. EISLER. I am ready to answer all questions, to tell my side.

The CHAIRMAN. That is not the question. Do you refuse to be sworn in? All right.

Mr. EISLER. I am ready to answer all questions.

The CHAIRMAN. Mr. Stripling, call the next witness. The committee will come to order, please. What is the pleasure of the committee?

Mr. STRIPLING. Mr. Chairman, I think that the witness should be silent, or take the stand or be removed from the room,

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one or the other, until this matter is determined.

Mr. MUNDT. Mr. Chairman, suppose you ask him again whether he refuses to be sworn.

Mr. RANKIN. Not "sworn in," but to be sworn.

The CHAIRMAN. Mr. Eisler, do you refuse, again, to be sworn?

Mr. EISLER. I have never refused to be sworn in. I came here as a political prisoner. I want to make a few remarks, only 3 minutes, before I be sworn in, and answer your questions, and make my statement. It is 3 minutes.

The CHAIRMAN. I said that I would permit you to make your statement when the committee was through asking questions. After the committee is through asking questions, and your remarks are pertinent to the investigation, why it will be agreeable to the committee. But first you have to be sworn.

Mr. EISLER. That is where you are mistaken. I have to do nothing. A political prisoner has to do nothing.

The CHAIRMAN. Then you refuse to be sworn.

Mr. EISLER. I do not refuse to be sworn. I want only 3 minutes. Three minutes to make a statement.

Mr. CHAIRMAN. We will give you those 3 minutes when you are sworn.

Mr. EISLER. I want to speak before I am sworn.

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The Committee then voted to cite petitioner for contempt, following which petitioner's counsel, Carol King, asked to be heard. The Chairman, who deemed the request to be too late, did not recognize Mrs. King and directed that petitioner be removed from the room (R. 53). While Mrs. King distributed a mimeographed statement to newspapermen (R. 28), petitioner departed in the custody of the two Security Officers of the Immigration and Naturalization Service who had brought him to the hearing room (R. 30).

Petitioner testified in his own behalf at the trial that when the subpoena was served upon him, he prepared for his appearance before the Committee by purchasing railroad tickets to Washington, making hotel reservations, and consulting counsel concerning his rights at the hearing (R. 122; cf. R. 110, 111). He stated that he was prevented from proceeding according to plan because of his arrest by the immigration authorities (R. 123). He was brought to Washington by the immigration officers on the evening of February 5 (R. 125). The next morning Mrs. King, his counsel, conferred with him and advised him with respect to his forthcoming appearance before the Committee that day (R. 126).

Petitioner also testified that he had not refused to testify before the Committee but had insisted, as a condition precedent to such testimony, that he be permitted "to make a few remarks in connection with my arrest" (R. 130),

"because I had objection against the whole, what I considered unlawful proceedings of this Committee against my person" (R. 133).[5] Further testimony in respect of the nature of petitioner's intended remarks was given by his wife, who stated that petitioner had "prepared a small statement, or a few remarks, if you want to, which he wanted to make to protest his illegal arrest by the Un-American Activities Committee—instigated by the Un-American Activities Committee" (R. 112).

Except for the foregoing quoted testimony, the trial court excluded as irrelevant proffered evidence relating to the content of the remarks which petitioner had intended to make before the Committee. Petitioner's counsel stated to the court that this evidence, if admitted, would show that petitioner had intended to tell the Committee that he was a political prisoner, that his arrest had been procured by the Chairman and other members of the Committee, that he had no opportu-

[5] Petitioner argues (Br. 94) that a refusal to be sworn is not a "default" within the meaning of the statute. But any refusal to testify at all, as distinct from a refusal to answer particular questions, clearly constitutes a default under R. S. 102. Cf. *Townsend* v. *United States*, 95 F. 2d 352, 355–7, certiorari denied, 303 U. S. 664. The subpoena summoned petitioner to appear and testify (R. 23), and this meant testify in accordance with established practice, under oath (see R. S. 101, 2 U. S. C. 191). The refusal to be sworn (petitioner did not intimate that he wished to make an affirmation in lieu of an oath) was obviously a refusal to testify and a default in the obligation imposed by the subpoena.

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nity fully to consult counsel, and that the Committee had issued the subpoena in order to prosecute him because of his political views and to prevent his departure to Germany (R. 134–135, 138).

The trial court also excluded as irrelevant proffered evidence in support of the following contentions: (1) that petitioner was an alien in transit and, therefore, not subject to process of the Committee (R. 95–97, 115, 116, 118); (2) that his arrest, detention and transportation to the hearing were illegal (R. 82, 87, 89, 90, 100, 101–102, 108, 124); (3) that the Committee had been actuated by an ulterior motive in summoning him to testify since their purpose was not to elicit any information from him but to prevent his return to Germany and to punish him for his political beliefs (R. 102, 119); and (4) that he had relied upon advice of counsel in insisting upon the right to state his objections before taking an oath and testifying (R. 122, 126, 146).

Petitioner was found guilty and sentenced to imprisonment for one year and to pay a fine of $1,000 (R. 229). Upon appeal to the United States Court of Appeals for the District of Columbia Circuit, the judgment was affirmed, one judge dissenting (R. 233, 245).

SUMMARY OF ARGUMENT

I

A. Since petitioner refused to be sworn except on conditions he had no right to impose, the Committee never reached the point of questioning him, and he cannot assert that the Committee would have asked improper questions. Petitioner is entitled at most to challenge the Resolution from which the Committee derives its authority. The sole constitutional question is as to the validity of the Resolution, not whether the Committee is thought to be good or bad, or whether on other occasions it has acted fairly or unfairly. Furthermore, there is a serious question as to whether a witness who defaults is entitled to attack the validity of the power vested in the Committee.

B, C. Congress may unquestionably investigate in aid of its legislative powers. The Resolution establishing the Committee on Un-American Activities operates in a field in which legislation has been enacted and proposed, the control or disclosure of propaganda activities directed at the forcible overthrow of our form of government. And the Resolution declares that the investigation is to be such as will "aid Congress in any necessary remedial legislation."

D. The fact that an object of the Committee has been to reveal and publicize subversive activities does not establish that the inquiry is not also in aid of the legislative process. The purposes

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are not inconsistent. The Resolution on its face lies within the Congressional power, and inquiry into the motives of the members of the Committee is forbidden. Furthermore, Congress may legitimately investigate subjects within its constitutional jurisdiction for the purpose of informing the public. Administrative agencies frequently have been authorized to obtain and publicize information as a means of safeguarding the public interest. E. g., *Electric Bond and Share Co.* v. *Securities & Exchange Commission,* 303 U. S. 419. The Constitution does not deny Congress the power directly to use its own investigative authority to accomplish the same end.

E. The Resolution authorizing the investigation does not violate the First Amendment. This would seem self-evident, since the Resolution imposes no restraints, and does not restrict speech in any way. The possibility of an unfavorable public reaction to the testimony given and the fact that this may deter persons from expressing their views is not the type of thing against which the First Amendment protects. In any event, the First Amendment has never been thought to limit the power to elicit testimony for public purposes; the need for accurate information has always been thought to outweigh the possible interference with personal rights resulting from compelled disclosures.

F. The Resolution is not unconstitutional for indefiniteness. In the first place, there would

seem to be no requirement of definiteness as between Congress and its committees, as custom and practice demonstrate. And there is nothing indefinite in the requirements of the criminal statute applicable to a witness who defaults; a witness who appears can be advised as to the matter under inquiry so as to determine the pertinence of a question irrespective of the generality of the Resolution establishing the committee. In any event, the test as to definiteness of a congressional resolution establishing a committee would be a very broad one, not the rule applicable to criminal statutes. The Resolution here satisfies this standard. While considered in isolation, its words may not have precise meanings, there can be little question that they are calculated to authorize the Committee to seek information concerning propaganda activities which undermine the principle of a republican form of government.

G. The Resolution is not unlawful because some improper questions might be asked, but is valid if there can be proper inquiries. Such cases as *Winters* v. *New York*, 333 U. S. 507, and *Thornhill* v. *Alabama*, 310 U. S. 88, are inapposite, since the Resolution does not limit freedom of expression. We think it preposterous to assert that because an investigating body might ask some improper questions, although it has not done so, the investigation as a whole is un-

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constitutional, so that lawful inquiry into legitimate matters is barred.

II

A. The affidavit of bias and prejudice filed by petitioner was properly held insufficient on its face, since it does not show the personal bias or prejudice required by the statute. The prior official rulings of judges, it is established, do not show personal bias, and the same should be true of the prior official conduct of other public officers. Here the affidavit alleges that Judge Holtzoff during the period before he became a judge in the performance of duties as an official of the Department of Justice was concerned with F. B. I. investigations of aliens and Communists, that he advised as to steps to be taken against them, and that he figured in an important capacity in determining the policy of the investigations. This falls far short of showing personal prejudice against the class investigated. Nor do the allegations that petitioner was within the class or category investigated or against which action was taken state or mean that Judge Holtzoff took action against him personally or had any personal feeling against him. And the allegation that "this investigation of my activities must have come to Justice Holtzoff's attention," means only that the Judge heard of it or read it, not that he adopted or approved it. None of these averments show personal bias

or prejudice. The "personal hatred" referred to in petitioner's brief finds no support in the affidavit. If petitioner could have alleged as fact anything showing such hatred, he certainly would have done so. The dislike of Communism as a system is not personal bias or prejudice, as petitioner concedes.

B. The affidavit was untimely because delayed until after the Judge had ruled against petitioner on preliminary matters.

III

The court below correctly held that "willfully" in R. S. 102 means deliberately or intentionally, not necessarily with an evil or bad purpose. If this were not so, a person deliberately disobeying a congressional committee would gain complete immunity as long as he thought he had a right to do so. The nature of the conduct prescribed and the context in which "willfully" is used show that intentional disobedience was meant to be punished. See *Sinclair* v. *United States,* 279 U. S. 263, 299.

IV

The subpoena, the Chairman's testimony and the Resolution itself sufficiently establish that petitioner was summoned to testify on a matter committed to the Committee. *Sinclair* v. *United States, supra,* at 295–296. Petitioner cannot go behind the Resolution by questioning the members

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of the Committee as to their individual motives. *United States* v. *Morgan*, 313 U. S. 409, 422.

V

Petitioner was not unlawfully denied the right to testify as to the contents of his proposed statement. With respect to willfullness, the most that would be relevant would be that petitioner was seeking to assert preliminarily a legal objection, not the grounds of the objection in detail. He was allowed to offer evidence that he intended to say that he considered the proceedings against him unlawful. Detailed evidence in elaboration of his intended attack upon the political motives of the Committee and the legality of his arrest would have brought irrelevant matters before the jury. And even if he did want to make legal objections, when the Committee ordered him to be sworn regardless, his refusal was a deliberate and intentional refusal to testify, willful within the meaning of the statute, irrespective of what he intended to say.

Petitioner was not unfairly deprived by the Committee of the right to make a legal objection. He did not even intimate that that was what he wanted to do. And he had no constitutional right to make such an objection before being sworn. No judicial tribunal operates in such a manner.

VI

Petitioner received a fair trial. The numerous adverse rulings of which he complained reflect

patience on the part of the Judge in the face of persistent attempts to adduce irrelevant evidence, after he had excluded identical evidence, in order to confine the trial to the issues which he considered pertinent. The Court did not take an undue part in the examination of witnesses. And there was no showing that the Court went too far in rebuking petitioner's counsel, or that this prejudiced petitioner's case. Whether the various objections to the trial court's conduct urged by petitioner are read singly or together, they do not show that petitioner did not receive a fair trial. Although the trial may not have attained the ideal of judicial decorum in which friction between counsel and the court is wholly absent, no evidence of prejudice to the petitioner is perceptible.

VII

Petitioner was not immune as an enemy alien or an enemy in transit from the duty to testify before the Committee.

ARGUMENT

I

THE COMMITTEE ON UN-AMERICAN ACTIVITIES WAS EMPOWERED TO REQUIRE PETITIONER TO TESTIFY.

A. THE NATURE OF THE CONSTITUTIONAL ISSUE

Petitioner's first contention is that the Committee on Un-American Activities is unconstitutional. Identical arguments have been rejected by

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the Court of Appeals for the Second Circuit in *United States* v. *Josephson*, 165 F. 2d 82, and by the Court of Appeals for the District of Columbia in *Barsky* v. *United States*, 167 F. 2d 341, in both of which certiorari was denied. 333 U. S. 838, 334 U. S. 843. (A petition for rehearing in the *Barsky* case is presently pending.) We submit that those decisions were clearly correct.

1. Before taking up the constitutional argument, however, it is important that the precise scope of the question confronting this Court be defined. In this case, as in *Josephson*, petitioner refused to testify before the Committee. Here he refused to be sworn except on conditions which he had no right to impose. Accordingly, the Committee never reached the point of questioning him. The petitioner therefore is not in a position to assert that the Committee would have propounded improper questions, so long as under the authorizing Resolution the Committee could have asked some questions which would have been within its constitutional authority. As this Court stated in dealing with a similar contention in *McGrain* v. *Daugherty*, 273 U. S. 135, 160:

> * * * we are not now concerned with the right of the Senate to propound or the duty of the witness to answer specific questions, for as yet no questions have been propounded to him. He is asserting—and is standing on his assertion—that the Senate is without power to interrogate him, even

if the questions propounded be pertinent and otherwise legitimate—which for present purposes must be assumed.

Accordingly, this case must be treated as if the Committee had intended—as, for all we know, it did—to ask petitioner whether to his knowledge the Soviet Government was disseminating in the United States propaganda designed to induce persons to overthrow the Government of the United States by force and to substitute for our constitutional system a dictatorship of a group taking orders from abroad.[6]

The sole constitutional issue, therefore, is whether the Committee can lawfully ask any question.[7] And this depends upon whether the Resolution creating the Committee, now embodied in the Legislative Reorganization Act of 1946, 60 Stat. 828, and House Rule XI (q) is totally unconstitutional on its face.

The constitutional question thus relates only to the Committee's power. Accordingly, we are not here concerned with any particular questions which it might ask, with the Committee's conduct, or with the manner in which the Commit-

[6] In the *Josephson* case the Court of Appeals stated that "the appellant could, for example, have been asked whether he knew of propaganda activities designed to bring about the immediate destruction of the Government by violence and the question, as he clearly would have known, would have been pertinent." 165 F. 2d at 88.

[7] There is a serious question as to whether petitioner is entitled to raise even this point. See pp. 25–29, *infra*.

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tee has treated other witnesses. As is well known, among those who have criticized the Committee for its tactics and procedures have been the President and the Attorney General. The issue in this case, however, is not whether, in our opinion or in the Court's opinion, the Committee has been a good one or a bad one, or whether on some occasions it may have treated witnesses or others fairly or unfairly, or have acted partially or impartially.[7a] If members of a Congressional committee abuse the powers which are granted them, the remedy lies with their constituents or with Congress as a whole—and there is good reason to believe, with respect to this very Committee, that such forces have not been wholly ineffective. But a possible—or a past—misuse of a power lawfully granted does not warrant a denial of the power's existence. Nor does anything which has happened in the questioning or treatment of other witnesses warrant an assumption that a particular witness who refused to answer questions at all would be questioned unlawfully.

2. As we have seen, in this case petitioner has refused to testify before the Committee except on conditions which he had no right to impose.

[7a] "If alternatives are no inquiry at all, or an inquiry that is abused, then the choice must be for the latter." Lindsay Rogers, *The American Senate*, page 209 (1926). See also Ehrmann, *The Duty of Disclosure in Parliamentary Investigation*, 11 Chicago L. Rev. 1, 117 (1943–44).

We think it questionable whether such a witness has standing to attack the constitutionality of the Resolution creating the Committee.

Petitioner was convicted for violation of R. S. 102, which is undoubtedly constitutional. That statute provides for the punishment of every person summoned to testify upon a matter upon inquiry before a committee of either House who willfully makes default. The purpose of this provision was to compel persons to appear. The orderly dispatch of Congressional business requires that even witnesses who claim that a committee is unlawfully created not ignore its summons, but that they appear before it and make their objection in a proper manner. Of course R. S. 102 would not apply to a refusal to appear before a group of persons, even of members of Congress, merely purporting to be a legislative committee without any legal authority. But insofar as a committee is in fact established by a House of Congress, with all the formal indicia of Congressional authority, R. S. 102 contemplates that witnesses obey the committee's process irrespective of whether the Resolution defining the committee's power is ultimately held to be unconstitutional.* The witness could, it is assured, urge at the proper time that a specific

* Here the Committee on Un-American Activities is created by House Rule X, 60 Stat. 822, the validity of which is not and cannot be challenged. Its powers are defined in House Rule XI (q), 60 Stat. 828, which petitioner assails.

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question was beyond the authority of the committee because the committee lacked constitutional basis for asking any questions. This provides adequate protection, and still allows the business of Congress to proceed.

This interpretation of R. S. 102 is supported by several analogies. Persons may be punished for defrauding governmental operations under statutes which are unconstitutional. *United States* v. *Kapp*, 302 U. S. 214; *Kay* v. *United States*, 303 U. S. 1. In each of these cases the penal provisions were clearly valid, and the question was whether Congress intended them to protect against fraud agencies unconstitutionally created. Thus, in *Kay* v. *United States*, 303 U. S. 1, where the defendant sought to upset a conviction based upon making false statements to the Home Owners' Loan Corporation, upon the ground that Congress had no constitutional authority to create the Home Owner's Loan Corporation, the Court stated (pp. 6–7):

> "It might as well be said that one could embezzle moneys in the United States Treasury with impunity if it turns out that they were collected in the course of invalid transactions. * * * Congress was entitled to protect the Government against those who would swindle it regardless of questions of constitutional authority as to the operations that the Government is conducting. Such questions cannot be raised by those who make false claims against

> the Government." *United States* v. *Kapp*, 302 U. S. 214, 217–218; *Madden* v. *United States*, 80 F. (2d) 672. While the instant case is not one of conspiracy to obtain money from the United States, but one of false statements designed to mislead those acting under authority of the Government, the principle involved is the same. Apart from any question of the validity of the other provisions of the Home Owners' Loan Act, Congress was entitled to secure protection against false and misleading representations while the Act was being administered, and the separability provision of the Act (§ 9) is clearly applicable.

The quotation here is apt, and indeed the present case is a stronger one. The separability clause invoked in the *Kay* case simply left the penal provisions of the Home Owners' Loan Act itself operative, notwithstanding the possibility of unconstitutionality of the remainder of the Act. In this case, the penal provisions (R. S. 102) are independent of the congressional authorization for the existence of the Committee.

Similarly, in *Blair* v. *United States*, 250 U. S. 273, the Court held that a witness before a grand jury cannot avoid testifying on the ground that the grand jury has no authority over the subject matter of the investigation. "* * * he is not entitled to challenge the authority of the court or of the grand jury, provided they have a *de facto* existence and organization. * * * And, for the

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same reasons, witnesses are not entitled to take exception to the jurisdiction of the grand jury or the court over the particular subject-matter that is under investigation" (p. 282).

In *United States* v. *United Mine Workers,* 330 U. S. 258, the Court held that obedience to a court order was required even where the court lacked jurisdiction. The same reasons suggest that a witness must obey a Congressional committee subpoena irrespective of what is ultimately decided as to the validity of the investigating committee's powers.

McGrain v. *Daugherty,* 273 U. S. 135, which also involved the failure of a witness to testify, did not arise under R. S. 102; accordingly the Court was not called upon to, and did not, consider this problem.

Although we feel that there is serious question whether petitioner may raise the issue, in the remainder of this Point we shall assume that he can challenge the validity of the Resolution pusuant to which the Committee acts.

We turn then to the only question which this Court may consider in that connection—the constitutionality of the Resolution under which the Committee acts.

B. THE SCOPE OF THE POWER OF CONGRESS

The power of either branch of Congress to institute investigations and to compel testimony with a view to the possible exercise of the legis-

lative function is indisputable. *McGrain* v. *Daugherty*, 273 U. S. 135, 171–175; *United States* v. *Norris*, 300 U. S. 564, 573. The necessity for the power exists in the very nature of the legislative function. As this Court stated in *McGrain* v. *Daugherty*, 273 U. S. at 175:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.

The cases establish, and it is not denied, that a congressional committee may seek facts by compulsion, when necessary, in aid of the power of Congress to legislate.[9] This means that Congress may seek to elicit all the facts bearing on a subject within its constitutional authority. It is not limited to inquiring into those facts which show the need for legislation, into those matters which it has power to regulate or prohibit. The power to

[9] Congress may, of course, also inquire into facts which might lead to amendment of the Constitution or to impeachment.

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investigate is necessarily broader than the substantive power which may be exerted by the investigating agency. *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186; *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501. It is equally important for Congress to be informed as to facts which would show legislation to be undesirable and unnecessary, and as to facts which show that constitutional standards, such as the clear and present danger test with respect to freedom of speech, are or are not satisfied. Congress obviously cannot tell whether there is need or constitutional basis for regulating the statements of which "propaganda" may consist until it learns what those statements are, and what the intent and effect may be.

C. THE RESOLUTION IS IN AID OF THE POWER OF CONGRESS TO LEGISLATE

The Resolution establishing the Committee on Un-American Activities (which, since its embodiment in the Legislative Reorganization Act of 1946, is also a statute) clearly satisfies the constitutional test.

The Committee on Un-American Activities has been authorized to conduct investigations of—

> (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin

and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress *in any necessary remedial legislation.* [Italics supplied.]

The purpose of the provision is apparent from its face—to secure information of a specified kind in order that any necessary remedial legislation may be enacted.

There is a well recognized field for legislation with respect to propaganda activities, notwithstanding the existence of constitutional limitations. From the information which the Committee receives, it conceivably could conclude that certain propaganda activities have reached the stage where they present a "clear and present" danger of bringing about a substantive evil, such as the overthrow of our form of government by means inconsistent with the Constitution, and that remedial legislation is necessary. Cf. *Dunne* v. *United States,* 138 F. 2d 137 (C. A. 8), certiorari denied, 320 U. S. 790. The Committee may learn that foreign governments are carrying on propaganda warfare in our midst with a view to undermining our constitutional principles through aliens who enter our shores. Such information could result in the amendment of our immigration laws to close even more tightly our boundaries to classes of persons believed to be engaged in such activities. The data disclosed by the investi-

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gation might show the necessity for increasing our internal security forces, and legislation and appropriations for this purpose could be initiated. Or the inquiry might disclose, negatively, that appropriations for the investigation of activities of foreign governments should not be decreased—or that they could be.

Illustrative of legislation which might be based upon the information adduced under the Resolution are the statutes regulating correspondence with foreign governments (cf. 35 Stat. 1088, as amended, 47 Stat. 132, 18 U. S. C. (1946 ed.) 5, now 18 U. S. C. 953), imposing safeguards against seditious conspiracy (cf. 35 Stat. 1089, 18 U. S. C. (1946 ed.) 6, now 18 U. S. C. 2384), prohibiting measures undermining the morale of the armed forces (54 Stat. 670, 18 U. S. C. (1946 ed.) 9, now 18 U. S. C. 2387), authorizing government radio broadcasts to foreign countries (Pub. No. 402, 80th Cong.), prescribing qualifications for government employment, requiring the registration of foreign agents (cf. 53 Stat. 1244, 22 U. S. C. 601, 611) and organizations carrying on certain types of propaganda (cf. 54 Stat. 1201, 18 U. S. C. (1946 ed.) 14, 15, now 18 U. S. C. 2386). See *Josephson* case, 165 F. 2d at 90.

As the Court of Appeals for the Second Circuit stated in the *Josephson* case (p. 90):

> Information gained by a committee of this nature, provided its search for the truth may not be frustrated by such ob-

structive tactics as those employed by the appellant, might well aid Congress in performing its legislative duties, viz., in deciding that the public welfare required the passage of new statutes or changes in existing ones or that it did not. Cf. Landis, *supra,* at pages 208–10.[10] Some of these duties are imposed not only by the principle that the Government shall preserve itself, but, of course, by express provisions in the Constitution. Thus among the purposes of the Constitution, as expressed in the Preamble, are to "insure domestic Tranquility," to "provide for the common defense," to "promote the general welfare," and to "secure the Blessings of Liberty." Art. 1, sec. 8 gives Congress the power to "provide for the common Defense," "to raise and support Armies," "to provide and maintain a Navy," "to make Rules for the Government and Regulation of the land and naval Forces," and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers." Art. IV, Sec. 4 provides that "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion" and on application "against domestic Violence."

From its inception in 1938 until it became a standing committee in 1945, the Committee on

[10] Landis, *Congressional Power of Investigation,* 40 Harv. L. Rev. 153 (1926).

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Un-American Activities was a special committee and proposed legislation was not referred to it. Consequently, although this does not mean that its inquiry did not result in legislation, it is difficult fully to appraise the results of its efforts. The Act of October 17, 1940, c. 897, 54 Stat. 1201, 18 U. S. C. (1946 ed.) 14–17, now 18 U. S. C. 2386, known as the "Voorhees Act," requiring the registration of domestic organizations carrying on subversive political and civilian military activities was introduced by a member of the Special Committee. The non-Communist affidavit requirement contained in Section 9 (h) of the Labor Management Relations Act, 1947, 61 Stat. 136, rested in large part on facts disclosed in the hearings of the Committee on Un-American Activities.[11] The Mundt-Nixon Bill (H. R. 5852, 80th Cong., 2d Sess.), which sought to curb Communist activity by a variety of measures, including the registration of "Communist-front" organizations, originated in the Committee on Un-American Activities and passed the House of Representatives. Other bills on the same general subject were referred to the Committee on Un-American Activities[12] and to other committees of the House and Senate.[13] They demonstrate that Congress contemplated and actually engaged in

[11] See brief for appellee in *American Communications Association* v. *Douds*, No. 336, pp. 24–25, 32–34.

[12] See Appendix A, *infra*, p. 108–109.

[13] See Appendix B, *infra*, pp. 110–111.

the exercise of its law-making powers in connection with the subjects under consideration by the Committee on Un-American Activities.

The power to conduct an investigation with a view to possible legislation cannot be measured, however, by the scarcity or the abundance of legislative recommendations emanating from the Committee or induced by its efforts. Some of the effects may have been negative in character. Congress may be dissuaded from changing other laws or appropriations, or persuaded that for practical or constitutional reasons no legislation on a subject should be enacted.

The only matter of consequence, however, is whether the subject of the investigation is such that the legislative processes might be aided by the facts disclosed. The facts amply demonstrate that the Resolution pursuant to which the Committee on Un-American Activities operates was designed to give such aid. The Resolution on its face declares that the investigation is to be such as will "aid Congress in any necessary remedial legislation."

D. THE RESOLUTION IS NOT UNCONSTITUTIONAL BECAUSE ONE OF THE COMMITTEE'S PURPOSES WAS TO EXPOSE SUBVERSIVE AND UN-AMERICAN ACTIVITIES

Petitioner contends that the Resolution is unconstitutional because the Committee's purpose is to publicize, to expose, subversive and un-American activities. The excerpts from the reports of

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the Committee and statements of its members quoted by petitioner (Br. 21–24) do indicate that this was *one* of the objects of the Committee. But it does not follow that the Resolution establishing the Committee is unconstitutional.

We shall show that it is entirely proper for Congress to investigate for purposes of disclosure within the field of its constitutional jurisdiction. But even assuming the contrary, petitioner has no valid complaint.

1. In the first place the existence of an intent to combat subversive activities by publicity does not mean that an inquiry is not also in aid of legislation. A disclosure, for example, that a certain organization was led by persons who were subservient to a foreign government would both tend to open the eyes of the public as to the nature of the organization and be relevant in determining whether legislative regulation of foreign agents were desirable.

In the present case petitioner did not let the inquiry proceed far enough to permit the Committee to ask him any questions. As long as there are some questions which the Committee might have asked in aid of legislative functions, as there clearly were, petitioner cannot assume that the Committee intended to question him only on other matters. Here we are concerned with the Resolution on its face (see p. 24, *supra*), and the fact (if it be a fact) that the members of the Committee or of Congress might have some

other or even an improper motive does not invalidate a legislative act such as the Resolution here involved, which is constitutional on its face. Compare *Sonzinsky* v. *United States*, 300 U. S. 506, 513–514; *Goesaert* v. *Cleary*, 335 U. S. 464, 467; *Veazie Bank* v. *Fenno*, 8 Wall. 533, 548; *McCray* v. *United States*, 195 U. S. 27, 56–59; *United States* v. *Doremus*, 249 U. S. 86, 93–94; *Magnano Co.* v. *Hamilton*, 292 U. S. 40, 44, 45.

Even more clearly, the co-existence of a proper and improper purpose by those entrusted with the administration of a Congressional Resolution does not vitiate legislative action. Throughout our history one of the most common criticisms of Congressional committees has been that they were being used by sponsors or members for political or personal reasons distinct from the ostensible aim of aiding the legislative functions of Congress. Cf. Dimock, *Congressional Investigating Committees* (Johns Hopkins University Studies, Series XLVII, No. 1, 1929), p. 164. In the two most recent leading cases in this field, *McGrain* v. *Daugherty*, 273 U. S. 135, and *Sinclair* v. *United States*, 279 U. S. 263, similar attacks were made upon the motives of a Congressional committee. Sinclair argued that the purpose of a question put to him was to aid the prosecution in pending litigation and was therefore improper. But this Court stated (p. 295):

> It may be conceded that Congress is without authority to compel disclosures for

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> the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits.
>
> The record does not sustain appellant's contention that the investigation was avowedly not in aid of legislation. He relies on the refusal of the committee to pass the motion directing that the inquiry should not relate to controversies pending in court, and the statement of one of the members that there was nothing else to examine appellant about. But these are not enough to show that the committee intended to depart from the purpose to ascertain whether additional legislation might be advisable. It is plain that investigation of the matters involved in suits brought or to be commenced under Senate Joint Resolution 54 might directly aid in respect of legislative action.

The *Sinclair* case involved refusal to answer a specific question. In the *McGrain* case, as in this one, there was a failure of the witness to appear at all. The Court indicated clearly there that the purpose of Congress was to be determined from the terms of the authorizing Resolution. See 273 U. S. at pp. 170, 172, 175–178. The Court stated (p. 178):

> The only legitimate object the Senate could have in ordering the investigation

was to aid it in legislating; and we think the subject-matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject-matter was not indispensable. In the *Chapman* case, where the resolution contained no avowal, this Court pointed out that it plainly related to a subject-matter of which the Senate had jurisdiction, and said "We cannot assume on this record that the action of the Senate was without a legitimate object". * * * In *People* v. *Keeler*, 99 N. Y. 463, * * * the court said (pp. 485, 487): * * * "We are bound to presume that the action of the legislative body was with a legitimate object if it is capable of being so construed, and we have no right to assume that the contrary was intended."

(Pp. 175–176)

The contention is earnestly made on behalf of the witness that this power of inquiry, if sustained, may be abusively and oppressively exerted. If this be so, it affords no ground for denying the power. The same contention might be directed against the power to legislate, and of course would be unavailing. We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses.

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2. Since the Resolution was predicated on the need for information for legislative purposes, it is unnecessary to decide whether Congress has authority to investigate for the sole purpose of bringing information to public attention. There is considerable support, however, among students of Congressional power for the view that the "informing function" of Congress in itself would have brought the investigation within its constitutional competence.[14] Potts, *Power of Legislative Bodies to Punish for Contempt,* 74 U. Pa. L. R. 691, 811; Galloway, *Investigative Function of Congress,* 21 Am. Pol. Sc. Rev. 47, 62; Cousens, *Investigations Under Legislative Authority,* 26 Georgetown L. J. 905, 918; McGeary, *The Developments of Congressional Investigative Power,* p. 104. Woodrow Wilson expressed the opinion that

> It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the

[14] It has been suggested that the function of informing the public is implied and inherent in the legislative purpose. Landis, *supra,* 40 Harv. L. Rev. at 205, 206, n. 227. A representative democracy relies upon the creation of a favorable public opinion for the acceptance and thus the enforcement of new legislation.

> country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function.[18]

We submit that Congress may under the Constitution undertake investigations for the purpose of publicizing information at least so long as the matters to be disclosed are related to a substantive congressional power. It is settled that Congress in the exercise of its regulatory power may authorize an administrative agency to receive and publicize information. *Electric Bond & Share Co.* v. *Securities & Exchange Commission*. 303 U. S. 419. In the *Electric Bond & Share Co.* case, this Court observed, in relation to the registration provisions of the Public Utility Holding Company Act, that "the requirement of information is in itself a permissible and useful type of regulation" (p. 439). This method of protecting the public interest by requiring the disclosure of information in fields subject to the power of Congress has been employed in a num-

[18] Wilson, *Congressional Government*, as quoted by Frankfurter in *Hands Off the Investigations*, 38 New Republic 329, 330.

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ber of other statutes. E. g., newspapers using the mails, 37 Stat. 533, 39 U. S. C. 233 (*Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288); Securities Act of 1933. 48 Stat. 74, 15 U. S. C. 77a; Food, Drug and Cosmetic Act, 52 Stat. 1040, 1041, 21 U. S. C. 321; Alien Registration Act, 54 Stat. 673, 8 U. S. C. 452; registration of lobbyists, 60 Stat. 839, 2 U. S. C. 261; registration of foreign agents, 52 Stat. 631, 22 U. S. C. 611; registration of certain subversive organizations, 54 Stat. 1201, 18 U. S. C. (1946 ed.) 14–17, now 18 U. S. C. 2386.

Indeed, the principle of disclosure has been advanced by persons zealous to protect civil liberties as the best method of dealing with the Communist problem in this country. The Report of the President's Committee on Civil Rights (*To Secure These Rights*, U. S. Govt. Printing Office, 1947) concluded that (pp. 52, 53):

> The principle of disclosure is, we believe, the appropriate way to deal with those who would subvert our democracy by revolution or by encouraging disunity and destroying the civil rights of some groups.
>
> * * * * *
>
> The federal government * * * ought to provide a source of reference where private citizens and groups may find accurate information about the activities, sponsorship, and background of those who are active in the market place of public opinion.

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We set forth the relevant section of the Report in full in the note below.[16] See also the *Josephson* case, 165 F. 2d at 89.

[16] "As we have said, one of the things which totalitarians of both left and right have in common is a reluctance to come before the people honestly and say who they are, what they work for and who supports them. Those persons in our own country who try to stir up religious and racial hatreds are no exception. They understand that the vicious doctrines which they advocate have been morally outlawed in America for more than a century and a half. This Committee is as eager to guarantee their civil rights as those of the people they attack. But we do not believe in a definition of civil rights which includes freedom to avoid all responsibility for one's opinions. This would be an unwise and disastrous weakening of the democratic process. If these people wish to influence the public in our national forum of opinion they should be free to do so, regardless of how distasteful their views are to us. But the public must be able to evaluate these views. Exactly how much anonymous, hate-mongering or other subversive literature there is we do not know. The amount of such matter fluctuates greatly from time to time. At the present, according to several witnesses who appeared before the Committee, many of those who spread racial and religious prejudices have "gone underground." As recently as 1940, however, a study by the staff of the Senate Committee on Campaign Expenditures revealed that one-third of the election propaganda in the campaign of that year was completely anonymous and one-half was partially and inadequately identified as to source and sponsorship. Moreover, the Committee reported that the anonymous material included "the most virulent, dishonest and defamatory propaganda." Congress has already taken the first step to remedy this inadequacy by amending the election laws to forbid the distribution of anonymous compaign literature.

"The principle of disclosure is, we believe, the appropriate way to deal with those who would subvert our democracy by revolution or by encouraging disunity and destroying the

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Inasmuch as propaganda emanating from foreign sources may affect the foreign relations of the United States, the national defense, and the

civil rights of some groups. We have considered and rejected proposals which have been made to us for censoring or prohibiting material which defames religious or racial minority groups. Our purpose is not to constrict anyone's freedom to speak; it is rather to enable the people better to judge the true motives of those who try to sway them.

"Congress has already made use of the principle of disclosure in both the economic and political spheres. The Securities and Exchange Commission, the Federal Trade Commission and the Pure Food and Drug Administration make available to the public information about sponsors of economic wares. In the political realm, the Federal Communications Commission, the Post Office Department, the Clerk of the House of Representatives, and the Secretary of the Senate—all of these under various statutes—are required to collect information about those who attempt to influence public opinion. Thousands of statements disclosing the ownership and control of newspapers using the second-class mailing privilege are filed annually with the Post Office Department. Hundreds of statements disclosing the ownership and control of radio stations are filed with the Federal Communications Commission. Hundreds of lobbyists are now required to disclose their efforts to influence Congress under the Congressional Reorganization Act. In 1938, Congress found it necessary to pass the Foreign Agents Registration Act which forced certain citizens and aliens alike to register with the Department of Justice the facts about their sponsorship and activities. The effectiveness of these efforts has varied. We believe, however, that they have been sufficiently successful to warrant their further extension to all of those who attempt to influence public opinion.

"The ultimate responsibility for countering totalitarians of all kinds rests, as always, with the mass of good, democratic Americans, their organizations and their leaders. The federal government must set an example of careful adherence to the highest standards in guaranteeing freedom of opinion

obligation of the United States to guarantee to each state a "Republican Form of Government" and protection against both "Invasion" and "domestic Violence," we think it clear that Congress has power under the Constitution to adopt a program of publicity and disclosure as a public safeguard against subversive propaganda which Congress does not wish to, and perhaps cannot, prohibit. We believe that Congress can accomplish this result by means of substantive legislation entrusting to the Executive Branch of the Government investigatory powers for informational purposes. If this is so, it cannot be said that the Constitution denies Congress power to carry out the investigatory function itself. The choice of means is clearly for Congress, and nothing in the doctrine of Separation of Powers requires that this type of inquiry be delegated to the Executive.

E. THERE IS NO INTERFERENCE WITH FIRST AMENDMENT RIGHTS

Petitioner argues at length that the authority granted to the Committee is in violation of the First Amendment. It is said that the Resolution permits an inquiry into sensitive matters which are protected by the First Amendment

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and expression to its employees. Beyond that it ought to provide a source of reference where private citizens and groups may find accurate information about the activities, sponsorship, and background of those who are active in the market place of public opinion." (Pp. 51–53.)

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and imposes a limitless restraint on mere thought and opinion. And elaborate arguments are presented which seek to emphasize the evils which result from imposing restraints on freedom of thought and speech. But this entire line of argument is designed to confuse what is self-evident. The Resolution imposes no restraints. After testifying before the Committee a witness can believe, say and do the same things as he could before. The Resolution permits investigation only; it does not impose any limits on freedom of speech. Indeed, it does not permit the Committee to control even the propaganda activities which are the subject matter of its investigations. Since there is no interference with First Amendment rights, the Resolution cannot be in violation of the Amendment.

Petitioner's reference to the "clear and present danger test" (Br. 39–40) demonstrates the incongruity of his argument that use of the power to investigate may violate the First Amendment. Although that test may govern the power of Congress to regulate speech, it cannot limit the power of Congress to inquire. For Congress would be unable intelligently to determine whether or not there was a clear and present danger warranting legislation unless it could obtain evidence as to the circumstances in which there was no such danger as well as in which there was.

Petitioner argues that the First Amendment is violated because the Committee's disclosures ex-

pose persons to adverse public sentiment, and that Congress has no power to publicize that "certain doctrines are officially regarded as dangerous" (Br. 37). Freedom of speech is said to be not only restrained but destroyed (Br. 38) by fears of adverse publicity, which discourage persons from expressing opinions which may be distasteful to the Committee. By describing such effects as "censorship" and restrictions upon speech, petitioner endeavors to bring the case within the doctrine of decisions forbidding actual legislative interference with First Amendment freedoms. And petitioner insists that "the First Amendment limits *all* the powers of Congress", the power of inquiry as well as the substantive powers (Br. 42).

We do not, of course, deny that the First Amendment applies to all the powers of Congress. But whether and to what extent it limits the exercise of the legislative power of inquiry depends on what the Amendment means.

As we have seen, the Resolution does not restrain speech in any way, nor does it authorize the Committee to do so. That should be an end of the problem, for the Committee has not asked petitioner any questions and all that is before this Court is the validity of the resolution itself. But if we assume that disclosures before the Committee will result in unfavorable publicity and discourage persons from subjecting themselves to the risk of similar unfavorable public

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reaction to the expression of their views, it does not follow that the First Amendment is in any way violated.

For it was not this sort of indirect consequence of public disclosure with which the First Amendment was concerned. Such indirect consequences may result from any public investigation. The Amendment does not provide, however, that Congress may not inform the public; it provides that "Congress shall make no law * * * abridging the freedom of speech or of the press". It was designed to prevent attempts by law to curtail freedom of speech. But it was not intended to protect persons against unfavorable public opinion, even though such opinion may be stimulated by disclosures made to or by an investigating body. None of the familiar cases cited by petitioner (Br. 36–43) even remotely so suggests. Nor does the possibility that persons may voluntarily refrain from expressing their views in order to avoid a hostile public reaction mean that any law has abridged their freedom of speech.

Whether or not the Amendment embodies a freedom to be silent generally, as is urged, it certainly does not accord a privilege to be silent when called upon to testify before a lawful body of inquiry. For no investigation would be constitutional if that were the case. And, obviously, the First Amendment itself does not make unlawful the otherwise proper use of compelled

testimony even if the inquiry does interfere with the alleged freedom to be silent.

The same conclusion may be reached by a different route, if it be assumed that such indirect effects are of the sort to which the First Amendment might apply. First Amendment rights are not absolute. They have never been thought to preclude the compulsory giving of testimony. The power to compel testimony for public purposes—legislative as well as judicial—is essential to the existence and operation of organized society. Not infrequently, compelled disclosures may bring persons into disfavor or disrepute, may result in loss of employment or other manifestations of individual or popular ill-will. And there is, of course, even the more drastic penalty of imprisonment for refusal to testify.

But the need for accurate first-hand information as a basis for governmental action has been deemed to outweigh the interference with personal rights resulting from compelled disclosures. And this is so even if the rights are thought to be within the field reached by the First Amendment. For First Amendment rights must be balanced against other legitimate and essential needs of the community.

This Court has noted that even where freedom to criticize the courts was involved, "reviewing courts are brought in cases of this type to appraise the comment on a balance between the desirability of free discussion and the necessity

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for fair adjudication, free from interruption of its processes". *Pennekamp* v. *Florida*, 328 U. S. 331, 336. Insofar as compulsory testimony is concerned, the interest of privacy is clearly overbalanced by the need for an efficient exercise of judicial power. "That efficiency should be accorded judicial power and withheld from legislative power, is contrary to the dictates of public policy as well as inimical to a theory of separate but equal governmental powers". Landis, *Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 219 (1926). When the necessities of the legislative process are contrasted, not with any direct restraint upon the right to speak one's views, but with the direct deterrent resulting from fear of a public opinion aroused by the disclosure, there can be even less question as to how the interests should be balanced. For the absence of any legal impediment to speech makes the assumed interference with First Amendment rights very slight indeed.

F. THE RESOLUTION IS NOT UNCONSTITUTIONAL FOR INDEFINITENESS

Petitioner argues that the resolution is unconstitutional because such phrases as "subversive and un-American propaganda" and "the principle of the form of government as guaranteed by our Constitution" have no meaning. It is contended that this leaves the Committee free to investigate whatever expressions it chooses, and

affords the witness no guidance to the pertinence of questions asked him within the meaning of the criminal statute (R. S. 102, *supra*, p. 3) punishing default or refusal to answer "any question pertinent to the question under inquiry".

Here again it is to be noted that no question has been put to petitioner. He is in no position to claim that any question is not pertinent to the inquiry. He has been indicted under the other phrase in R. S. 102, for willfully making default. As the Court of Appeals declared in the *Josephson* case (165 F. 2d at 87–88):

> But this point is not available to the appellant. By refusing to testify at all he refused to answer any questions that were pertinent as well as those that were not and thus he was not put to the decision he argues could not have been made, viz., whether or not any particular question was pertinent. We may, therefore, put aside his contention that the language of the authorizing statute is so vague that a witness before the committee has no criteria to indicate in doubtful cases what questions asked would have the requisite pertinence. Here it is enough to say, and the appellant as much as concedes, that some questions could and perhaps would have been put that were pertinent to the inquiry, no matter how vague were these criteria.

1. *There is no requirement of definiteness for resolutions empowering legislative committees to*

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investigate. But we think that there is a more basic answer to petitioner's contention. In order to determine whether the resolution is unconstitutionally vague it is necessary, first, to determine the criterion which governs Congress in establishing committees with investigatory powers.

We start with the proposition that no provision of the Constitution—and nothing in its basic structure—limits the powers of inquiry which Congress may bestow on any committee, so long as it does not go beyond the sphere over which Congress itself has authority. There is no doctrine of separation of powers as between Congress and its committees. If it were feasible, Congress or one of its Houses could conduct an investigation itself, without delegating its authority to any committee. In the beginning, the Senate had only 26 members, less than some present committees,[11] and only slightly more than the 21 members on the present Senate Committee on Appropriations. 60 Stat. 815. Indeed, R. S. 102 still refers to matters "under inquiry before either House * * * or any committee of either House."

Such a Congressional inquiry could be conducted without any underlying statute or resolution defining its scope. The inquiry would neces-

[11] Most House committees have 25 or 27 members. The Committee on Appropriations consists of 43 members. 60 Stat. 822.

sarily be limited to facts relating to subjects which Congress had constitutional authority to investigate. It would be necessary to show that a particular question pertained to such a subject, but the absence of a resolution describing the subject to be investigated would not render the whole proceeding void.

The Committees sit as arms of Congress, not as subordinate agencies. And the necessities of their relationships to Congress require that the subjects over which they have jurisdiction be broadly defined. All regular standing committees—at least in the Senate (Legislative Reorganization Act, 1946, Sec. 134, 60 Stat. 831–832)—may make "investigations into any matter within its jurisdiction".[10] The Committees on Interstate and Foreign Commerce, for example, have jurisdiction over "interstate and foreign commerce generally", *inter alia* (60 Stat. 817, 826); the Committees on Agriculture over "agriculture generally", *inter alia* (*id.*, at 815, 823); the Committees on the Armed Services over "common defense generally", *inter alia* (*id.*, at 815, 824);

[10] Investigations are authorized in the House by special resolution. But these resolutions frequently authorize the standing committees merely "to conduct thorough studies and investigations relating to matters coming within the jurisdiction of such committee". See, for example, House Resolution 141, 80th Cong., 1st sess., printed at 93 Cong. Rec. 5057, which uses the above language in authorizing the Committee on Armed Services to conduct an investigation; House Resolution 93, printed in 93 Cong. Rec. 5058.

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and the Committees on Appropriations simply over "appropriation of the revenue for the support of the Government" (*ibid.*)—which might permit inquiry into every subject for which Congress does or could be asked to appropriate money. These definitions of the powers of Congressional committees are far broader than the standards of definiteness required in criminal statutes. They are far broader than the standards applicable when the Congress is delegating authority to the Executive Departments or agencies. No administrative body could be empowered merely to regulate "interstate or foreign commerce generally". Cf. *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495. And yet no one has ever suggested that these committees are unconstitutional, or that they lack power to investigate, because of the sweep of their authority.

But petitioner argues that the rule as to definiteness of criminal statutes becomes applicable in a prosecution for refusing to testify before a committee, that R. S. 102 and the statute or resolution embodying the Committee's authority must be read together as an integrated criminal law, and that if the authorizing resolution so read does not satisfy criminal law standards of definiteness it must be deemed unconstitutional in so far as compelling testimony from witnesses is concerned. Acceptance of this argument would impose upon the power of Congress to create committees re-

quirements as to specificity entirely inconsistent with practice and history, and without any constitutional basis. For the long exercised power to establish committees with general investigating authority would be futile if such committees could not prosecute witnesses who would not testify.

No such limitation is essential to protect witnesses against essential unfairness or infringement of their right not to be questioned about matters outside the constitutional authority of Congress. We turn to the criminal statute, R. S. 102, to see whether it gives a witness or prospective witness an "ascertainable standard of guilt" (*Winters* v. *New York,* 333 U. S. 507, 515), without regard for the generality of the statute or resolution by which a committee is created.

There is no problem as to this with respect to the portion of R. S. 102 involved in this case. It provides that "every person who, having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House * * * or any committee of either House of Congress, willfully makes default" shall be guilty of a misdemeanor. The ingredients of the crime are that the witness must be summoned to give testimony, that it be on a matter under inquiry, and that he "willfully makes default". There is nothing indefinite

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about any of these factors insofar as the witness is concerned. The statute does not leave it to the witness to determine the nature of the matter under inquiry; he need only know that the summons is to testify on a matter which is under inquiry. And this is a reasonable means of exercising the power of Congress to investigate. The defaulting witness is not thereby deprived of his right to defend against prosecution on the ground that the whole proceeding is unconstitutional, but that does not go to the definiteness of the statutory obligation.

Nor is the second clause of R. S. 102—which has no application to the present case—which punishes refusal "to answer any question pertinent to the question under inquiry", made unconstitutionally indefinite by the generality of the statute or resolution creating the investigating committee. If we assume that the witness must have a basis for judging the pertinence of the "question under inquiry" in order to determine whether he must answer, it does not follow that such information is obtainable only from the resolution creating the committee. A witness might not be aided by reference to "the common defense generally" or to "interstate and foreign commerce generally". The precise question under inquiry in an investigation or in a portion of it would normally be obvious at the time of the question. A witness who honestly had doubts could ask the committee before deciding whether

to answer a particular question. Elaboration on this point seems unnecessary, since petitioner refused to testify at all and was not indicted for violating this part of R. S. 102.

2. *The Resolution is sufficiently definite.*—In any event, even if we assume that resolutions, rules or laws creating legislative committees must satisfy some standard of definiteness, the Resolution here would be valid. If any such requirement exists, the standard of definiteness required must be a broad one, not the rule applicable to criminal statutes. What the test should be is not entirely clear; at most it would require that the charter of a committee have some general meaning, not that all of the terms employed be words of precision.

In this period of propaganda warfare there is a knowable content in the statutory word "propaganda." It is not an indefinite concept which includes everything. Webster's *New International Dictionary* (2d ed., 1939) defines it as follows:

> a. Any organized or concerted group, effort, or movement to spread a particular doctrine or system of doctrines or principles; as, the need of a more active social *propaganda.*
>
> b. Now, often, secret or clandestine dissemination of ideas, information, gossip, or the like, for the purpose of helping or injuring a person, an institution, a cause, etc.; as, the victim of the opposing party's

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propaganda; belligerent *propaganda* among neutrals. * * *

A scheme or plan for the propagation of a doctrine or system of principles; as, the cleverly worked-out *propaganda* of the enemy.

Similarly it is difficult to believe that anyone would read the phrase "the principle of the form of government as guaranteed by our Constitution," as meaning anything other than the republican form of government, which, too, has specific content. "* * * the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves." *In re Duncan,* 139 U. S. 449, 461. The phrase is narrower than "the principles of the Constitution" discussed in *Schneiderman* v. *United States,* 320 U. S. 118.[19]

[19] The majority in the *Schneiderman* case did not find it necessary to define these principles, but accepted the Government's definition for purposes of the decision (320 U. S. at 140). The dissent of Chief Justice Stone defined the principles as follows: "* * * among them are at least the principle of constitutional protection of civil rights and of life, liberty and property, the principle of representative government, and the principle that constitutional laws are not to be broken down by planned disobedience. I assume also that all the principles of the Constitution are hostile to dictatorship and minority rule; and that it is a principle of our Constitution that change in the organization of our gov-

The words "subversive and un-American" which qualify "propaganda," when read in their context, are descriptive of the propaganda activities which are subject to investigation. While considered in isolation these words may have broad and different meanings to different people, there can be little question that in their context they are calculated to authorize the Committee to seek information concerning propaganda activities which undermine the principle of the republican form of government.

In the *Josephson* case the Court of Appeals for the Second Circuit stated (165 F. 2d at 88):

> At the very least the language of the authorizing statute permits investigating the advocacy of the idea that the Government or the Constitutional system of the United States should be overthrown by force, rather than modified by the peaceful process of amendment of the Constitution set forth in Article V.

There is nothing in this case to indicate that anything other than such information would have been sought from petitioner.

In the view we take of the statute, it marks off a specified area of conduct for investigation and so informs the world. This, we submit, is all that is required.

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ernment is to be effected by the orderly procedures ordained by the Constitution and not by force or fraud." (320 U. S. at 181.)

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6. THE RESOLUTION IS NOT UNLAWFUL BECAUSE SOME IMPROPER QUESTIONS MIGHT BE ASKED, BUT IS LAWFUL IF THERE CAN BE VALID INQUIRIES

The basic conflict between our position and the petitioner's is this: We maintain that the Resolution is valid on its face, and that in any event it cannot be held void so long as any parts of it, or any inquiries under it, would be constitutional. Petitioner, on the other hand—while apparently not denying that some constitutional questions might be asked under the Resolution—contends that if the Resolution on its face might permit *some* inquiries not within the constitutional power, it must fall in its entirety.

It is unnecessary to cite cases for the proposition that "the cardinal principle of statutory construction is to save and not to destroy." *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30. This principle underlies both the rule that a law should be given that construction which will preserve its constitutionality and the doctrine that valid and separable portions and applications of laws may stand even though other portions or applications might be deemed unconstitutional. *Jones & Laughlin* case, *supra; Electric Bond and Share Corp.* v. *Securities and Exchange Commission,* 303 U. S. 419; *Dorchy* v. *Kansas,* 264 U. S. 286; Cooley, *Constitutional Limitations* (1868), pp. 180–181.

As against these basic principles petitioner invokes *Thornhill* v. *Alabama,* 310 U. S. 88,

Winters v. *New York,* 333 U. S. 507; *Stromberg* v. *California,* 283 U. S. 359, and *Herndon* v. *Lowry,* 301 U. S. 242, each of which deals with a criminal statute punishing some method of expression. The *Winters* case, most recently decided, declared that (509–510):

> * * * It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the *punishment of incidents fairly within the protection of the guarantee of free speech* is void, on its face, as contrary to the Fourteenth Amendment. *Stromberg* v. *California,* 283 U. S. 359, 369; *Herndon* v. *Lowry,* 301 U. S. 242, 258. A failure of *a statute limiting freedom of expression* to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment, violates an accused's rights under procedural due process and freedom of speech or press. [Italics supplied.]
>
> * * * * *

(p. 512):

> On its face, the subsection here involved violates the rule of the *Stromberg* and *Herndon* cases, *supra,* that statutes which include prohibitions of acts fairly within the protection of a free press are void.

And the *Thornhill* case states (310 U. S. at 98):

> * * * Where regulations of the liberty of free discussion are concerned, there

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> are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression. *Stromberg* v. *California,* 283 U. S. 359, 368; *Schneider* v. *State,* 308 U. S. 147, 155, 162–163. Compare *Lanzetta* v. *New Jersey,* 306 U. S. 451.

These statements of the rule upon which petitioner relies are sufficient to show that it is inapplicable here. For the Resolution empowering a Congressional committee to take testimony is obviously not "a statute limiting freedom of expression." It does not punish anyone for expressing his views or doing anything else within the purview of the First Amendment. It does not "regulate the liberty of free discussion." We have dealt with these matters at pages 46–51, *supra,* and further elaboration seems unnecessary here.

In sum, we think it preposterous to assert that because an investigating body might ask some improper question, although it has not yet done so, the investigation as a whole is unconstitutional, so that lawful inquiry into legitimate matters is barred. But that is petitioner's position.

H. THE RESOLUTION AUTHORIZES INQUIRY INTO MATTERS OF GRAVE PUBLIC CONCERN

Finally, it has been urged that the resolution authorizes Congress to investigate the private

affairs of private citizens. It seems sufficient
answer this in the language of the Second C
cuit in the *Josephson* case (165 F. 2d at 88–89

> * * * This subject was sufficien
> broad in scope so that the informati
> sought to be gained for the use of
> Congress would be comprehensive and a
> quate, but was nevertheless confined
> certain types of propaganda about
> potency of which there can be little dou
> If such propaganda takes the form of,
> example, advocacy of the overthrow of
> Government by violence, it is rightfu
> called "Un-American" and a sensible
> gard for the self-preservation of the nati
> may well require its investigation, with
> view to the enactment of whatever remed
> legislation may be needed or to the amen
> ment thereof. One need only recall
> activities of the so-called fifth columns
> various countries both before and duri
> the late war to realize that the Uni
> States should be alert to discover and d
> with the seeds of revolution within its
> And if there be any doubts on the sc
> of the power and duty of the Governm
> and Congress to do so, they may be
> solved when it is remembered that one
> the very purposes of the Constitution its
> was to protect the country against dan
> from within as well as from without.
> The Federalist, Nos. II–X. Surely, m
> ters which potentially affect the very s
> vival of our Government are by no mea
> the purely personal concern of anyone.

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II

THE AFFIDAVIT OF BIAS AND PREJUDICE DID NOT REQUIRE THE DISQUALIFICATION OF THE TRIAL JUDGE

A. THE AFFIDAVIT DID NOT SHOW PERSONAL BIAS OR PREJUDICE

Section 21 of the Judicial Code (formerly 28 U. S. C. 25, now 28 U. S. C. 144) provides:

> Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, * * *. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time.

This section has been authoritatively construed in *Berger* v. *United States,* 255 U. S. 22, as meaning that the judge to whom an affidavit of bias is submitted must take the allegations of fact contained therein as true, and determine only the "legal sufficiency" of the affidavit.[20] In ref-

[20] Judge Holtzoff recognized this to be the rule, and accordingly based his ruling on the facts alleged by petitioner (R. 4–6, 207–8), even though he knew them to be untrue, stating (R. 6):

erence to the requirement that the affidavit contain a statement of fact and reasons, the Court stated, *inter alia* (p. 33–34):

> Of course the reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment.

P. 35:

> We are of opinion, therefore, that an affidavit upon information and belief satisfies the section and that upon its filing, *if it show the objectionable inclination or disposition of the judge,* which we have said is an essential condition, it is his duty to "proceed no further" in the case. [Italics supplied.]

The *Berger* opinion did not discuss what was meant by *personal* bias or prejudice. It held, however, that allegations and statements of the judge showing strong personal antipathy toward a class of which defendants were members was sufficient.[21] This means that disqualification re-

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"Having thus disposed of the affidavit, I think it would be appropriate for me to state that I have no recollection of ever hearing of the defendant in this case until I saw his name in the newspapers several months ago."
See also R. 208.

[21] It was alleged that Judge Landis had said to a defendant in another case: "One must have a very judicial mind, indeed, not to be prejudiced against the German Americans in this country." (255 U. S. at 28.)

"You are of the same mind that practically all the German-Americans are in this country, and you call your-

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sults if such an attitude is displayed toward a class or group to which the defendant belongs. But it does not do away with the requirement that the bias or prejudice be personal.

The cases establish that a manifested attitude as to the merits of the controversy is insufficient, and that prejudice must be based upon something other than the judge's rulings in the case [22] or in other cases.[23]

Furthermore, it is clear that a general antipathy toward such classes as law violators would not be "personal." Probably every judge would be prejudiced against thieves, swindlers, murderers, and advocates of forcible overthrow of the government. Similarly, a dislike of a philosophy such as Communism or Nazism, which is counter

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selves German-Americans. Your hearts are reeking with disloyalty. I know a safeblower, he is a friend of mine, who is making a good soldier in France. He was a bank robber for nine years, that was his business in peacetime, and now he is a good soldier, and as between him and this defendant, I prefer the safeblower." (255 U. S. at 29.)

[22] *Ex parte American Steel Barrel Co.*, 230 U. S. 35; *Refior* v. *Lansing Drop Forge Co.*, 124 F. 2d 440 (C. A. 6), certiorari denied, 316 U. S. 671; *Scott* v. *Beams*, 122 F. 2d 777 (C. A. 10), certiorari denied, 315 U. S. 809; *Ryan* v. *United States*, 99 F. 2d 864 (C. A. 8), certiorari denied, 306 U. S. 635; *Minnesota & Ontario Paper Co.* v. *Molyneaux*, 70 F. 2d 545 (C. A. 8); *Morse* v. *Lewis*, 54 F. 2d 1027 (C. A. 4), certiorari denied, 286 U. S. 557; *Craven* v. *United States*, 22 F. 2d 605 (C. A. 1), certiorari denied, 276 U. S. 627.

[23] *Ryan* v. *United States*, 99 F. 2d 864 (C. A. 8), certiorari denied, 306 U. S. 635; *Sacramento Suburban Fruit Lands Co.* v. *Tatham*, 40 F. 2d 894 (C. A. 9), certiorari denied, 282 U. S. 874.

to the principles of our constitutional system, cannot be regarded as a personal bias, as petitioner concedes.[24] It might be difficult to find a judge not possessing such an aversion, and yet this has not prevented Communists or Nazis from being treated fairly, as this Court's own decisions attest.[25] The statute obviously does not mean that such an attitude should be regarded as personal bias.

One other observation would seem pertinent in view of the nature of petitioner's allegation. The mere fact that a public official has worked—even in a law enforcement capacity—on any of the above subjects, would not show personal bias and prejudice against members of the classes involved. Public officials, except perhaps those in the highest echelons, have their tasks assigned to them, and the performance of their assignments does not necessarily express their personal views. Judges who come from public life, as many do, cannot be said to be *personally* prejudiced in favor of the activities which they have previously undertaken, or against those at whom those activities were directed.

We now turn to the allegations of fact in the affidavit of bias and prejudice (R. 222–225).

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[24] "A distinction is to be made, in this respect, between an aversion to Communism as a system and a hatred of those who advocate it" (Br. 63).

[25] *Schneiderman* v. *United States*, 320 U. S. 118; *Klapprott* v. *United States*, No. 42, this Term; *Baumgartner* v. *United States*, 322 U. S. 665.

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We ask only that it be read fairly—not, as petitioner implies, technically. But we think it appropriate to point out that the affidavit was undoubtedly drawn by experienced counsel, and that on its face it shows a straining to the utmost to state facts favorably for petitioner.

The affidavit at the beginning and at the end (R. 222, 225) alleges personal bias and prejudice generally. These general conclusions obviously do not constitute a sufficient averment of facts or reasons to satisfy the statute.

The affidavit states that petitioner is a member of the German-Communist movement, and that a report on his activities by J. Edgar Hoover, Director of the Federal Bureau of Investigation, was placed in the record of the hearings of the Committee on Un-American Activities out of which this case arose, that this report indicates strong personal bias and prejudice against him (R. 222), and that Mr. Hoover is violently anti-Communist (R. 224). The affidavit itself reveals that this report by Mr. Hoover to the Committee occurred over a year after the termination of Judge Holtzoff's connection with the Department of Justice and his elevation to the bench (R. 222). The affidavit alleges that, while in the Department of Justice, Judge Holtzoff was admittedly a close personal friend of Mr. Hoover, and was associated with him in sponsoring legislative and other activities reflecting Mr. Hoover's "intemperate" views. These allegations are ob-

viously only background; they clearly do not show personal bias on the part of Judge Holtzoff.

The affidavit alleges that Judge Holtzoff while in the Department of Justice was *assigned* as legal adviser to the F. B. I. (R. 223–224), and that he was concerned with the investigation of Communists, including petitioner. These allegations read as follows:

> 1. "His duties were concerned especially with the investigation by the F. B. I. into the activities of aliens and communists, into both of which categories I fall. I believe that this investigation of my activities must have come to Justice Holtzoff's attention during the period while he performed such duties" (R. 223).
>
> 2. "In connection with his duties as United States attorney assigned to the F. B. I., Justice Holtzoff advised J. Edgar Hoover as to steps and actions to be taken against alien communists, such as myself." He sponsored legislation for the deportation and incarceration of aliens and appeared in defense of the F. B. I. (R. 223).
>
> 3. "Justice Holtzoff was legal advisor to the F. B. I. at the time the investigation of me was commenced and continued as such until September, 1945. Upon information and belief, he figured in an important capacity in advising and aiding and determining the policy, nature, scope and objectives of the investigation directed

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against aliens and communists, which necessarily included myself." (R. 224.)

a. These averments charge, in the first place, that Judge Holtzoff in the performance of his official duties was concerned with F. B. I. investigations of aliens and Communists, that he advised as to steps to be taken against them, and that he figured in an important capacity, in determining the policy of the investigation. But the fact that a public official, in carrying out the official duties assigned to him, participates in an investigation, even importantly, does not show *personal* prejudice against the class being investigated. And the same is true as to the allegation in (2) above that Judge Holtzoff, before his elevation to the bench, advised Mr. Hoover as to steps to be taken against alien Communists. The affidavit itself charges such action by Judge Holtzoff only in his previous official assignment in the Department of Justice. There is no allegation of any statement or act showing personal hostility comparable to the vehement expressions of ill-will and enmity toward German-Americans which were attributed to Judge Landis. We do not think that the possible antipathy to an ideology arising from such official activity would be as personal as that of a judge ruling adversely to a party in a former trial or in an earlier stage of the same proceeding, and yet that is not grounds for disqualification.

Such attitude or disposition of mind as is imputed to Judge Holtzoff from the mere fact of giving advice in the performance of his duty as a lawyer may be compared with that of a member of Congress, who, in his official capacity, initiates and advocates legislation. In the absence of any actual expression of personal prejudice or hatred against those whose activities he seeks to regulate, the mere fact of participation in the preparation of legislation does not show such personal bias or prejudice on his part against each member of that group as to impugn his impartiality of judgment in the event he subsequently sits as a judge in a case involving such an individual. We think that the practice to which Mr. Justice Jackson adverted in his opinion of December 6, 1948, in *Hirota* v. *MacArthur,* 335 U. S. 876, 879, when he said "* * * it is not the custom of this Court that a Justice disqualifies from passing on a particular case because he actively participated as a Senator or Representative in making the law under which it was tried" indicates that such participation does not manifest personal bias or prejudice.

b. We now turn to the allegations designed to show that Judge Holtzoff was prejudiced against the petitioner himself. The averments are (1) that Judge Holtzoff was adviser to the F. B. I. at the time "the investigation of me was commenced and continued" (R. 224); (2) that the "investigation" was of "aliens and communists, *into both of*

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which categories I fall" (R. 223); that "his duties related to steps and actions to be taken against alien communists, *such as myself"* (R. 223), and that the investigation of alien communists "*necessarily included myself"* (R. 224); and (3) "I believe that this investigation of my activities must have come to Justice Holtzoff's attention" (R. 223).

The allegation as to Justice Holtzoff being the F. B. I. adviser at the time of the investigation does not, of course, prove bias. The three allegations that petitioner was within the class or category investigated or against which action was considered or taken do not state or mean that Judge Holtzoff took action against him personally or had any personal feeling against him. At most, the Judge was advising as to the class or category into which petitioner fell, which "necessarily included" him.

The strongest allegation of personal knowledge is that "this investigation of my activities must have come to Justice Holtzoff's attention"—and we have no doubt that petitioner would have stated it more strongly if he possibly could. But this, on its face, means only what it says, that petitioner believes that the investigation *must have* come to the judge's attention. This would mean at most that the Judge had heard of the investigation, not that he took part in it—that the report came to his attention. There is no statement that the Judge studied it, adopted it, approved it, or took any action whatsoever con-

cerning it. Indeed, there is no allegation that it actually did come to the judge's attention.[26]

These averments read separately or together do not show personal bias or prejudice toward petitioner or toward Communists as a class.

In his brief, petitioner states (p. 59) that the affidavit in summary says:

> (1) As legal adviser to the F. B. I., Justice Holtzoff participated in investigations of aliens and Communists, including a specific F. B. I. investigation of the appellant (an alien and a Communist) which resulted in a report that he is a foreign agent. (2) Justice Holtzoff has a personal hatred of Communists, as shown by his sponsorship of a bill for the deportation of alien Communists and their incarceration in concentration camps and by his admiration for and close friendship with J. Edgar Hoover.

As appears from the preceding discussion, the first point is an inaccurate over-statement. The second point, Judge Holtzoff's "personal hatred for Communists," the theme underlying most of petitioner's subsequent discussion, is not contained in the affidavit at all; it is merely petitioner's unsupported characterization, an attempt to make the affidavit resemble the allegations in the *Berger* case. If petitioner could have alleged as fact

[26] The fact that it did not actually come to the Judge's attention (R. 6, 208) indicates the reason for petitioner's failure to make a more positive statement.

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anything showing personal hatred, he certainly would have done so. And the affidavit itself—although not the description of it in petitioner's brief—fails to allege any such facts.

If the affidavit here should be construed to assert that Judge Holtzoff had acquired the conviction that Communism embodies a subversive and illegal political program and that legislative and other governmental measures should be adopted to combat it, we nevertheless maintain that this would not show *personal* bias or prejudice against petitioner. A judge may preside at the trial of a person, and conclude that the person is a menace to a society; he would nevertheless not be disqualified from presiding at the subsequent trial of the same person on other charges. *Craven* v. *United States,* 22 F. 2d 605, 607–608 (C. A. 1), certiorari denied, 276 U. S. 627; *Henry* v. *Speer,* 201 Fed. 869, 872 (C. A. 5); *Parker* v. *Oil Co.*, 13 F. 2d 497 (D. Mass.). "Frequently, in the disposition of cases, both civil and criminal, a judge is called upon to form and express an opinion upon a matter or issue which may come before him in a subsequent proceeding arising out of the same state of facts. The courts are practically unanimous in the view that neither the forming nor the expression of such a conclusion, under such circumstances, disqualifies a judge in the subsequent matter, particularly where the issue of fact in the latter proceeding is to be

determined by a jury." *Slayton* v. *Commonwealth*, 185 Va. 371, 376."

Probably all judges have established attitudes (based upon their experience, environment and interests), concerning the nature, objectives and treatment of Communists. "If, however, 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will." *In re J. P. Linahan, Inc.*, 138 F. 2d 650, 651 (C. A. 2). This opinion goes on (p. 652):

> More directly to the point, every human society has a multitude of established attitudes, unquestioned postulates. Cosmically, they may seem parochial prejudices, but many of them represent the community's most cherished values and ideals. Such social preconceptions, the "value judgments" which members of any given society take for granted and use as the unspoken axioms of thinking, find their way into that society's legal system, become what has been termed "the valuation system of the law." The judge in our society owes a duty to act in accordance with those basic predilections inhering in our legal system (although, of course, he

[27] Cf. *Freudunreich* v. *Mayor and Council*, 114 N. J. L. 290, which held that a councilman is not disqualified on the ground of personal prejudice from voting to dismiss a policeman even though previously he had prosecuted the policeman on the same charge.

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> has the right, at times, to urge that some of them be modified or abandoned). The standard of dispassionateness obviously does not require the judge to rid himself of the unconscious influence of such social attitudes.

In rejecting a charge of bias against an administrative official, this Court observed in *United States* v. *Morgan*, 313 U. S. 409, 421:

> * * * That he not merely held, but expressed, strong views on matters believed by him to have been in issue, did not unfit him for exercising his duty in subsequent proceedings ordered by this Court. As well might it be argued that the judges below, who had three times heard this case, had disqualifying convictions. * * * Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. * * *

Cf. *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 700–701.

The Court must make the same assumption as to members of the judiciary.

B. THE AFFIDAVIT WAS UNTIMELY

It is the duty of a trial judge not to permit an affidavit of bias or prejudice to be used as a

means of accomplishing delay and otherwise embarrassing the administration of justice. Timeliness is an indispensable statutory requirement. The statute requires such an affidavit to be filed "not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time." In view of the practice in the District Court for the District of Columbia of sitting in continuous session, except in the summer, with the several judges sitting in rotation or upon assignment, an applicant is not held to the ten-day requirement but he is required to file the affidavit with reasonable promptness after the disqualifying facts are known, and he must show a good cause for any delay (see R. 242). The trial judge considered the explanation for the delay in this case to be inadequate and, in his opinion, the application was made for dilatory purposes (R. 4).

The death of the brother of Mr. Isserman, one of petitioner's counsel, in the interim between May 20, when petitioner learned that Judge Holtzoff would preside, and May 29, when the affidavit was filed, might ordinarily be considered a reasonable excuse for the delay. On May 20, when he and his counsel knew definitely of Judge Holtzoff's designation, the trial was scheduled to begin within six days. Despite the obvious urgency if another judge was to be substituted, Mr. Isserman stated he would discuss the matter with co-counsel in Washington on May 23 (R. 225). Washington

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counsel appeared before Judge Holtzoff on or about May 20 and obtained an adjournment of the trial to May 27. Motions to dismiss the indictment and for a bill of particulars, which were argued before Judge Holtzoff on May 23, were denied on the same day (R. 231). Later on the same day, Mr. Isserman and co-counsel appeared before Judge Holtzoff and upon their request another adjournment of the trial, this time to June 4, was granted because of Mr. Isserman's bereavement (R. 4). At that time, they made no suggestion that the Judge was disqualified. The affidavit was filed on May 29 and the trial began on June 4 (R. 231).

At none of the appearances before Judge Holtzoff at which continuances were requested and motions argued did petitioner's counsel intimate that a change in the trial judge would be sought. Despite the immediacy of the original trial dates, they remained silent. Only after Judge Holtzoff had ruled adversely to them on the motions was the affidavit filed. Moreover, petitioner had other counsel than Mr. Isserman, including local counsel who now represent him in this Court. Indeed, the affidavit was prepared, not by Mr. Isserman, but by Mrs. King, who had participated as counsel from the beginning.

In view of these factors, we submit that the lower courts were not arbitrary in finding (R. 4, 236) that petitioner had not acted with the

requisite "due diligence." A party is not warranted in waiting until a judge has decided certain issues against him before determining whether to seek to disqualify the judge.

III

"Willfully," as Used in R. S. 102, Means Deliberately or Intentionally

The trial court charged that the term "willfully," as used in R. S. 102, meant a deliberate and intentional default, as distinguished from mere inadvertence or accident, and not necessarily that the default must be motivated by an evil or bad purpose; that petitioner's motivation was immaterial so long as his default was deliberate and intentional (R. 172). Both the majority and dissenting judges in the Court of Appeals agreed with this instruction.

Petitioner argues, however, that bad faith or a bad purpose is an essential ingredient of willfulness, and that the charge was therefore erroneous.

The word "willfully," as used in R. S. 102, has twice before been interpreted by the Court of Appeals for the District of Columbia as requiring deliberate or intentional conduct, but not necessarily an evil or bad purpose. *Fields* v. *United States*, 164 F. 2d 97, 99–100, certiorari denied, 332 U. S. 851; *Townsend* v. *United States*, 95 F. 2d 352, 357–358, certiorari denied, 303 U. S.

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664.[28] We think that the court below properly adhered to those decisions.

This Court has frequently pointed out that "willful" is a word "of many meanings, its construction often being influenced by its context." *Spies* v. *United States*, 317 U. S. 492, 497; *United States* v. *Murdock*, 290 U. S. 389, 394; *United States* v. *Illinois Central R. Co.*, 303 U. S. 239; *Screws* v. *United States*, 325 U. S. 91, 101. In the *Illinois Central* case, the Court observed (303 U. S. at 242–243):

> * * * In statutes denouncing offenses involving turpitude, "willfully" is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong,

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[28] In the *Townsend* case the Court of Appeals stated (p. 358):

"* * * The meaning of the word depends in large measure upon the nature of the criminal act and the facts of the particular case. It is only in very few criminal cases that 'willful' means 'done with a bad purpose.' Generally, it means 'no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.' *American Surety Co.* v. *Sullivan*, 2 Cir., 7 F. 2d 605, 606. In *United States* v. *Edwards*, C. C., 43 F. 67 (cited by appellant) the court said: 'Willfully means with design, with some degree of deliberation.' In *Grand Trunk Ry. Co.* v. *United States*, 7 Cir., 229 F. 116, 119, the court said: 'The word "willfully," as used in the act, has a number of times engaged the attention of the courts, and has quite uniformly been held not to require an evil intent, but only that the defendant should have purposely or intentionally failed to obey the statute, having knowledge of the facts.' * * *"

> the word is often used without any such implication. Our opinion in *United States* v. *Murdock*, 290 U. S. 389, 394, shows that it often denotes that which is "intentional, or knowing, or voluntary, as distinguished from accidental," and that it is employed to characterize "conduct marked by careless disregard whether or not one has the right so to act."

Making default before a congressional committee is not an offense involving moral turpitude. A consideration of the nature of the offense, its context and demonstrate that "willfully," as used in R. S. 102, can mean no more than deliberately and intentionally.

The statute provides for punishment of persons who "willfully make default." If "willfully" meant with a bad or evil purpose, and not merely deliberately, any person who did not believe it right or lawful for a congressional committee to summon him would be completely immune from punishment. Such a witness would gain substantially complete immunity by setting up his own "good faith judgment" against that of the committee on the question of the committee's power. Congress obviously did not intend that its process be so flouted even by persons acting in good faith, for the effectiveness of its compulsory investigative power would be greatly

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impaired if such a defense were available. The type of offense under consideration and the purpose of the statute show that "willfully" here could not have meant more than deliberately and intentionally.

The *Sinclair* case, 279 U. S. 263, confirms this analysis. That case involved the second clause in R. S. 102, "refusal to answer pertinent questions." In rejecting the contention that good faith was a defense, the Court said (p. 299):

> There is no merit in appellant's contention that he is entitled to a new trial because the court excluded evidence that in refusing to answer he acted in good faith on the advice of competent counsel. The gist of the offense is refusal to answer pertinent questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt. There was no misapprehension as to what was called for. The refusal to answer was deliberate. The facts sought were pertinent as a matter of law, and § 102 made it appellant's duty to answer. He was bound rightly to construe the statute. His mistaken view of the law is no defense. *Armour Packing Co.* v. *United States,* 209 U. S. 56, 85. *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20, 49.

The clause of R. S. 102 involved in the *Sinclair* case did not contain the word "willfully." But

as the above excerpt from the opinion indicates, the phrase "refuses to answer" (not "fails to answer") in itself denotes intentional conduct. And we think it clear that Congress did not intend the two phrases in the same sentence to have totally different meanings. For there would be no basis in reason for requiring witnesses to answer questions despite their good faith reliance on advice of counsel, and yet permitting them to use the same advice as an excuse for not appearing at all, a much more serious interference with the investigatory power.

Petitioner relies on the *Murdock* case, which also involved a failure to supply information, in that case to the Bureau of Internal Revenue. But this Court held "willfully" there to include an element of bad faith largely because the informational requirement was joined in a sentence containing substantive obligations to which the requirement of willfulness also pertained. The Court said (290 U. S. at 395–396):

> Aid in arriving at the meaning of the word "willfully" may be afforded by the context in which it is used (*United States* v. *Sioux City Stock Yards Co.*, 162 Fed.

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556, 562), and, we think, in the present instance the other omissions which the statute denounces in the same sentence only if willful, aid in ascertaining the meaning as respects the offense here charged. The Revenue Acts command the citizen, where required by law or regulations, to pay the tax, to make a return, to keep records, and to supply information for computation, assessment or collection of the tax. He whose conduct is defined as criminal is one who "*willfully*" fails to pay the tax, to make a return, to keep the required records, or to supply the needed information. Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. And the requirement that the omission in these instances, must be willful, to be criminal, is persuasive that the same element is essential to the offense of failing to supply information.

The same approach to the present case shows that "willfully" has the less stringent meaning, for here the word is used in the context of the clause considered in the *Sinclair* case. As we have shown, Congress could not sensibly have intended the two clauses to have different meanings in so far as the factor of intent is concerned. And the punishment for failure to appear or testify is not coupled with substantive crimes with respect to which Congress might have wished to require the existence of an evil or bad purpose. The statute thus clearly differs from that in the *Murdock* case.

IV

There Was Adequate Proof That Petitioner Was Summoned To Testify on a Matter of Inquiry Committed to the Committee

Petitioner argues (Br. 48–53) that there was no proof that he was summoned to testify "upon matters of inquiry committed to said Committee" by the Resolution, as the indictment avers (R. 215).[29] This contention, we submit, rests upon a misunderstanding of the meaning of the statutory requirement, as embodied in the indictment.

We submit that there was sufficient evidence that petitioner was summoned to testify on a matter under inquiry before the Committee. In

[29] R. S. 102 applies to every person summoned as a witness "to give testimony * * * upon any matter under inquiry before either House * * * or any committee of either House * * *."

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the first place, the subpoena served upon petitioner called upon him to appear and testify "touching matters of inquiry committed to said Committee" (R. 23).[20] The Chairman of the Committee on Un-American Activities testified that at the times when the subpoena was served and when petitioner appeared, as well as at other times, the Committee had operated pursuant to and in accordance with the Resolution creating it (R. 13). The enabling Resolution (*supra*, pp. 3–4), of which the Court could properly take judicial notice, disclosed the nature and scope of the inquiry. The conjunction of the Resolution and the subpoena, which was admitted in evidence (R. 22), effectively disposes of petitioner's contention that the Government failed to prove that he was summoned to testify on a matter under inquiry before the Committee.

Petitioner contends that such evidence does not show that the inquiry was within the scope of the powers of Congress or the Committee's authority. But he cannot go behind the authorizing Resolution. In the present case, in view of petitioner's refusal to submit to any questioning

[20] A similar direction was used by the Senate in *McGrain* v. *Daugherty*, 273 U. S. 135 ("then and there to answer such questions pertinent to the matter under inquiry as the Senate may order the President of the Senate *pro tempore* to propound") and in *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597, 612 ("to answer such questions pertinent to the matter under inquiry as the Senate through its said committee or the President of the Senate may propound").

(except upon conditions, which he had no right to impose), he cannot now complain that the prosecution failed to show the line of inquiry which the Committee expected to follow and to prove its pertinency to the investigation. As long as there were questions which the Committee could lawfully have asked (see pp. 32–36, *supra*), we must assume that the questions which the Committee might have propounded would have been pertinent and otherwise legitimate. *McGrain* v. *Daugherty, supra,* 160.

The *Sinclair* case (279 U. S. 263) upon which petitioner relies, shows the error of his argument. In that case, Sinclair raised two questions, *inter alia,* (1) that there was no proof of any authorized inquiry, and (2) that the question propounded was not pertinent to such an inquiry. 279 U. S., at 291. The first of these points doubtless related to the clause in R. S. 102 here invoked by petitioner, the second to his refusal to answer specific questions.

As to the first point, the Court held that the evidence adequately showed that the Committee was authorized to make the inquiry. In so holding it relied entirely upon the resolutions themselves. The Court stated that (p. 295):

> Resolutions 282 and 294 were sufficient until the expiration of the Sixty-seventh Congress during which they were adopted, but it is argued that Resolution 434 was

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not effective to extend the power of the committee.

The Court then went on to analyze the terms of Resolution 434, and the relation of that Resolution to its predecessors. On the basis of this analysis, the Court concluded (p. 296): "The context and circumstances show that Resolution 294 was intended to be kept in force."

The court then held that the burden of proof as to the second point, the pertinence of the question, was on the United States, but that this burden had been satisfied. Since, in view of his refusal to be sworn, petitioner was not indicted under the portion of R. S. 102 penalizing refusal "to answer any question pertinent to the question under inquiry", this part of the *Sinclair* opinion—which petitioner quotes (Br. 51)—is not apposite here. For the Government cannot be required to prove the pertinence of any question when the petitioner has made it impossible for any question to be asked.[n]

The *Sinclair* case thus holds that reference to terms of the underlying resolution constitutes sufficient proof that the inquiry was authorized. In the instant case, there is proof that the inquiry was proceeding pursuant to the Resolution, and the Resolution itself was before the trial court.

[n] The Court held (279 U. S. at 298) that "the question of pertinency under § 102 was rightly decided by the court as one of law", and was not one for the jury to decide. This would clearly also be true as to whether the inquiry was authorized. No question is raised as to that portion of the holding here.

Unless the Resolution is held to be null and void this is sufficient.

Petitioner insists, however, that he should have been allowed to prove that the Committee (Br. 50) "had not summoned the petitioner in order to elicit any information in a matter of inquiry committed to it by Congress or in the exercise of any power given to it by Congress, but rather to harass and punish him for his political beliefs and to prevent his departure from the United States and his return to Germany."

But this is a question of the motives of the members of the Committee—for the only way petitioner could establish such ulterior purposes would be to interrogate the various Committee members as to the reason why each individual voted to subpoena petitioner. These motives are not proper matters for judicial inquiry. If an examination into such matters were allowed, every recalcitrant witness could turn his trial for contempt into a protracted trial of the motives of the Committee members. See pp. 37–40, *supra*.

We submit that Congress did not intend the phrase "upon any matter under inquiry before a committee" to open the door to any such collateral attack upon the committees themselves. Whether the summons was for a matter under inquiry was to be determined from objective facts, such as the subpoena itself and the resolution or other documents giving the Committee its powers, and, if a question is asked, from the pertinence

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of the question. This was the approach followed in the *Sinclair* case. In *Morgan* v. *United States*, 304 U. S. 1, 18, and *United States* v. *Morgan*, 313 U. S. 409, 422, this Court held "that it was not the function of the court to probe the mental processes" of the Secretary of Agriculture in reaching his conclusion. The Court declared that (313 U. S., at 422):

> But the short of the business is that the Secretary should never have been subjected to this examination. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding." *Morgan* v. *United States*, 298 U. S. 468, 480. Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that "it was not the function of the court to probe the mental processes of the Secretary." 304 U. S. 1, 18. Just as a judge cannot be subjected to such a scrutiny, compare *Fayerweather* v. *Ritch*, 195 U. S. 276, 306–07, so the integrity of the administrative process must be equally respected. See *Chicago, B. & Q. Ry. Co.* v. *Babcock*, 204 U. S. 585, 593. It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other. *United States* v. *Morgan*, 307 U. S. 183, 191.

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We think the same principles are applicable to investigations conducted by congressional committees. There are even greater practical reasons why an examination of the motives, frequently different, of a number of Committee members should not be permitted.

Respect for a coordinate branch of government requires the presumption that Congress will remain within the limits of constitutionality in the procedure under which its committee conducts its investigation and in the legislation which may ensue. As Mr. Justice Holmes wisely admonished, "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, K. & T. Ry. Co.* v. *May*, 194 U. S. 267, 270. Early in our history this Court stated in *Anderson* v. *Dunn*, 6 Wheat. 204, 226:

> The idea is Utopian, that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest on responsibility, and stated appeals to public approbation. Where all power is derived from the people, and public functionaries, at short intervals, deposit it at the feet of the people, to be resumed again, only at their will, individual fears may be alarmed by the monsters of imagination, but individual liberty can be in little danger.

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Chief Justice Marshall expressed a similar view in *Gibbon* v. *Ogden*, 9 Wheat. 1, 197:

> The wisdom and discretion of congress, their identity with the people, and the influence which their constituents possess at elections are, in this, as in many other instances, * * * the sole restraints on which * * * the people must often rely solely, in all representative governments.

Self-imposed limitations and political responsibility offer protection against abuse of the power of inquiry by undue interference with the right of individuals to privacy, since Congress can always withdraw power that is oppressively exercised and voters can oust abusive Congressmen. We must look, therefore, for safeguards against abuse to "the forces of responsibility which are operating from within Congress, and are generated from without." Frankfurter, *Hands off the Investigations*, 38 New Republic 329, 331.

V

Petitioner Was Not Unlawfully Denied the Right To Testify as to the Contents of His Proposed Statement

Petitioner argues that the trial court erred in refusing to let him prove that the remarks he wished to make before consenting to be sworn were objections to the legality of the proceeding (Br. 54–59). This was error, he contends, because such evidence would bear upon the question of

willfulness and because he had a constitutional right to object before testifying."

A. With respect to willfulness, the most that would be relevant would be that petitioner was seeking to assert preliminarily a legal objection, not the grounds of the objection in detail. For the only matter of significance with respect to his intention would be that he was not acting obstinately, but wished to make an objection based upon his views as to the law.

The first answer to petitioner's contention is that he was allowed to offer evidence on this point. Petitioner, in response to the question by his counsel "And what did you want to say?" testified, "Before I took the oath I wanted to make a few remarks in connection with my arrest" (R. 130); and, again, in response to a question as to why he wished to make some remarks before he would be sworn, petitioner stated: "Because

[11] Petitioner also urges in this connection that the fact that he was arrested, allegedly illegally, and brought before the Committee while in custody made it unconstitutional for the Committee to question him. But he was already under subpoena to appear at that time. The arrest by officers of the Immigration and Naturalization Service, even if, as alleged, for the purpose of bringing petitioner before the Committee and preventing his departure from the United States (R. 101–102) would not vitiate the subpoena. Nor would it be material, whether as petitioner alleges, the Committee instigated the arrest by the Service. Legislative bodies, like courts, may deter witnesses to insure their appearance. Cf. *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597, 616–619; cf. F. R. of Crim. Proc., Rule 46 (b). And the fact that such detention may not have been necessary does not free the witness from his obligation to testify.

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I had objection against the whole, what I considered unlawful proceedings of this Committee against my person" (R. 133). And petitioner's wife testified that he had "prepared a small statement, or a few remarks, if you want to, which he wanted to make to protest his illegal arrest * * * instigated by the Un-American Activities Committee" (R. 112). See also R. 77, 155–160. It is true that the trial court confined testimony concerning the proffered statement to a characterization or a summarization of its content and excluded evidence of the details (R. 134–135, 138–139). But detailed evidence in elaboration of petitioner's intended attack upon the political motivation of the Committee and the legality of petitioner's arrest would have brought before the jury matters which, as we have shown, were irrelevant.

Secondly, even if he did want to make legal objections, when the Committee ordered him to be sworn regardless, his refusal was a deliberate and intentional refusal to testify and willful within the meaning of the statute, irrespective of what he meant to say in his remarks. If any fact finding tribunal overrules a witness' objection and orders him to proceed, the witness has no right to remain obdurate. If he refuses to obey the tribunal's subsequent order deliberately and intentionally, he is acting willfully within the meaning of the statute designed to insure obedience to the tribunal's authority, even if he thinks the prior adverse ruling unlawful.

B. The first answer to the argument that petitioner had a constitutional right to object before testifying is also factual. There is no suggestion, either in the transcript of the hearing before the Committee (quoted in full, *supra*, pp. 10–12) or in the evidence at the trial, that petitioner would have been denied the right to make a legal objection if he had asked for it. The testimony of the Chairman (R. 48–49) implies that he would have been allowed to do so.

Petitioner did not even remotely suggest to the Committee that that was what he was trying to do. He first flatly refused to take the stand at all; "I am not going to take the stand" (R. 43). He then stated, "You will not swear me in before you hear a few remarks" (R. 44). And subsequent, "I want to make a few remarks, only 3 minutes, before I be sworn in, and answer your questions, and make my statement. * * * I want only 3 minutes * * * to make a statement" (R. 46–47). To which the Chairman replied: "We will give you those 3 minutes when you are sworn" (*ibid.*). But petitioner insisted, "I want to speak before I am sworn" (*ibid.*).

Although a witness may have a right at some time to make a legal objection, he has no right to condition his testimony on being allowed "to make a few remarks" or "a statement". As the Chairman testified: "But there was no legal objection in this case. He just would not be sworn. The question of legality did not enter into it. Even

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his attorney didn't say a word. * * * He should certainly, at least, attempt to make some statement as to his legal objections; but in this case there was no statement made as to his legal——" (R. 49).

It is thus clear that petitioner was not deprived by the Committee of any right to object to the legality of the proceeding. The Committee had been informed that petitioner had counsel with him (R. 43). It was not required to assume that the reiterated request to make remarks or a statement was a request to make a legal objection.

Furthermore, petitioner was not even deprived of the opportunity to make his statement, for the Chairman said that petitioner would be granted his 3 minutes when he was sworn, an offer which petitioner refused (R. 47).

The Constitution certainly does not require that a witness be allowed to make an objection before he is sworn. As long as the objection is allowed to be made before any unlawful question is required to be answered, the witness' rights are amply protected. And whether or not it was the practice of the Committee normally to allow objections to be made before witnesses were sworn, the Committee did not act arbitrarily or unreasonably in requiring petitioner to be sworn, inasmuch as petitioner never indicated that he wished to make a legal objection. The Constitution provides that "Each House may determine

the Rules of its Proceedings * * *." Art. 1, § 5, cl. 2; cf. *United States* v. *Smith*, 286 U. S. 6; *United States* v. *Ballin*, 144 U. S. 1. In authorizing the Committee to investigate, the House placed no restrictions upon its mode of examination. So long as no constitutional restraints or fundamental rights were impaired, the Committee had discretion to determine when statements of witnesses could be made. "The Committee, not the witness, must determine the procedure to be followed in such an investigation. There could be no orderly investigation otherwise, and the inquiry would break down. Irritation or pique upon the part of a witness, because his judgment upon such a point is contrary to that of the committee, constitutes no lawful reason and affords no justification for defying its process." *Townsend* v. *United States*, 95 F. 2d 352, 360 (D. C.), certiorari denied, 303 U. S. 664.

It was the Committee's prerogative to determine the time and manner of statements or remarks of witnesses lest the hearing be perverted by declarations having little relevance to the issue at hand. It has been well established since 1795 that Congressional committees are not bound to follow proceedings of courts of law in conducting investigations. Dimock, *Congressional Investigating Committees*, p. 153; cf. *People ex rel. McDonald* v. *Keeler*, 99 N. Y. 463. This case does not present such a basic absence of fair play or such an arbitrary or improvident use of power

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as will constitute a denial of due process of law. "Here the question under consideration concerns the exercise by the Senate of an indubitable power; and if judicial interference can be successfully invoked it can only be upon a clear showing of such arbitrary and improvident use of the power as will constitute a denial of due process of law. That condition we are unable to find in the present case." *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597, 620.

VI

Petitioner Received a Fair Trial

Petitioner contends that the trial judge displayed active bias and hostility toward him throughout the trial and in the sentencing (Br. 70–91). We agree, of course, that a judge's conduct of a trial should be judicial, dispassionate and impartial. But petitioner's accusation of Judge Holtzoff is unwarranted. "All too often, it seems, appellants like these become overcritical of a trial judge after conviction and on appeal seek to try him instead of the merits or demerits of their cause." *United States* v. *Breen*, 96 F. 2d 782, 784 (C. A. 2). Separate passages cut from their context and from the trial as a whole often have an apparent importance which they do not possess in their proper setting. Some of the very incidents of alleged misconduct upon which petitioner relies will serve to reveal the lack of merit in his accusation.

The judge's refusal to entertain offers of proof on certain subjects is urged by petitioner as an illustration that "he exacted retribution for fancied slights" (Pet. 19). The court carefully and repeatedly explained to counsel that no offer of proof is necessary "when a subject matter is excluded as irrelevant. An offer of proof is necessary to protect a litigant's right when the admissibility of the evidence depends on the nature of the answer. But when the entire subject matter is irrelevant, you do not need an offer of proof" (R. 109; see, also, e. g., R. 120, 134, 138, 149). This ruling, far from being an expression of hostility, is strictly in accordance with the established procedure as summarized in 1 Wigmore, *Evidence* (3d ed. 1940), § 17, p. 318: "But a specific offer of evidence is not needed where an *entire class of evidence* has been in advance formally declared inadmissible by the trial court during preliminary argument or colloquy; for the court's ruling relates forward to all possible offers of such evidence and renders them needless. Moreover, after such a ruling, the persistence of counsel in making or repeating such offers may be treated as improper attempts to get before the jury the effect of such evidence."

The latter observation is particularly germane in the case at bar. Instead of indicating hostility, the numerous adverse rulings reflect patience on the part of the judge in the face of persistent attempts to adduce irrelevant evidence

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after he had excluded identical evidence in order to confine the trial to the issues which he considered pertinent. To cite just one example, the court ruled that reliance upon advice of counsel was not a defense to the charge of willful default and, therefore, that evidence as to the advice which petitioner had received was irrelevant (e. g., R. 122). Nevertheless, counsel throughout the trial persisted in this line of inquiry, and now complains that the consequent adverse rulings (R. 126, 133, 146, 149) indicate hostility.

The trial court is charged with having "assumed the role of the prosecution and conducted a hostile cross-examination of the petitioner" (Pet. 8). An examination of the instances cited by the petitioner (Br. 81–83) will reveal that the court did not exceed proper bounds. As this Court observed in *Glasser* v. *United States,* 315 U. S. 60, 82, "the judge conducting a jury trial in a federal court is 'not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct.'" Petitioner's criticism of the judge's participation in the case is similar to the attack of the appellant in *Simon* v. *United States,* 123 F. 2d 80, 83 (C. A. 4), certiorari denied, 314 U. S. 694, which the court rejected with a reference to the proper role of a trial judge:

> Appellant's counsel strenuously complains that the trial judge questioned the witnesses from time to time in an effort

> to bring out the facts of the case. This is precisely what he should have done. It cannot be too often repeated, or too strongly emphasized, that the function of a federal trial judge is not that of an umpire or of a moderator at a town meeting. He sits to see that justice is done in the cases heard before him; and it is his duty to see that a case on trial is presented in such way as to be understood by the jury, as well as by himself. He should not hesitate to ask questions for the purpose of developing the facts; and it is no ground of complaint that the facts so developed may hurt or help one side or the other. * * *

Petitioner complains that the trial judge continuously reprimanded and harassed defense counsel (Br. 72–81). Discretion must be conceded to a trial court in maintaining dignity and decorum. Counsel for petitioner was found by the court to be brusque and discourteous in a few instances, particularly in the manner in which he addressed the court (R. 51–52). An examination of the record reveals that such rebukes and admonitions as were administered were couched in temperate and reserved language. In the colloquy between petitioner's counsel and the court in which Mr. Isserman was warned not to speak abruptly to the court but to maintain a courteous manner, the judge expressed a desire to help counsel and acknowledged that counsel's discourtesy was not intentional (R. 52). It is, of

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course, impossible to reproduce the tone or demeanor of counsel or of the court—and it may well have been counsel's tone or manner which provoked the court. But there was no such spirited controversy between counsel and court as can be inferred to have intimidated counsel. There is no showing that petitioner was thereby prevented from introducing all the evidence that was properly available to him. Moreover, since the reprimands were administered outside of the hearing of the jury, any impression of hostility on the part of the judge toward petitioner or his counsel was carefully avoided.

The record contains many illustrations of the court's concern that petitioner's right to a fair trial be protected. In the *voir dire* examination, for example, the following colloquy occurred at the bench (R. 8):

> The COURT: If you press the question I shall ask it: "If you have read anything about Eisler, have you read anything charging him with being a foreign agent, an atomic spy, the master mind of the Communists?"
>
> Mr. ISSERMAN. I think we will withdraw that.
>
> The COURT. I am suggesting that for the defendant's protection.
>
> Mr. ISSERMAN. Your Honor's point is well taken.

Throughout the trial bench conferences were employed in order to avoid any possibility that

the jury would draw inferences unfavorable to petitioner from adverse rulings. While petitioner complains of many instances in which the court ruled adversely to him, it should not be overlooked that there were many other instances in which the court ruled adversely to the prosecution, when, in his opinion, the circumstances warranted such rulings. See, e. g., R. 49, 54, 74, 121, 123, 124, 125, 128.

We have not undertaken to discuss individually many of the over 20 items of alleged unfairness treated in petitioner's brief (pp. 70–91). We think the mere reading of most of them will show the lack of merit to petitioner's contentions. And the same is true if the record is read as a whole, as it must be to determine whether the items taken together were unfair or prejudicial.

In this case there was no substantial conflict in the evidence as to the essential points that were required to be submitted to the jury. Although the trial may not have attained the ideal of judicial decorum in which friction between counsel and court is wholly absent, no substantial prejudice to the petitioner is perceptible.

VII

Petitioner was not Immune as an Enemy Alien or an Alien in Transit from the Duty to Testify Before the Committee

A. Petitioner came to this country in June 1941, on a transit visa (R. 114). In February

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1947, about ten days after the Committee's subpoena was served upon him (R. 22), he was arrested by immigration officials under an executive warrant. The contention is now advanced (Pet. 25–26) that as an alien enemy in transit, detained in this country against his will, he was not required to appear and testify before a Congressional Committee.

The statute punishing a willful default applies without distinction to "every person" (*supra*, p. 3). The obligation to furnish legislative committees with such information and data as they are constitutionally empowered to elicit is not peculiar to citizenship, and, therefore, petitioner was no less amenable than a citizen to obey the statute. Cf. *Carlisle* v. *United States*, 16 Wall. 147. Alien enemies, even those interned, have access to our courts. *Ex parte Kawato*, 317 U. S. 69, 73. They are entitled to the constitutional guarantees of the Bill of Rights in criminal proceedings even in time of war. *Von Moltke* v. *Gillies*, 332 U. S. 708. Other privileges and opportunities were afforded petitioner during his sojourn in this country. Correlatively, alien enemies cannot hold themselves above process in private or public litigation. Oppenheim's *International Law* (Rev. 6th ed. Lauterpacht), p. 253. No authority in international law affords them an immunity from the process of our Congress. So long as they are in the United States, it is immaterial whether they are enemy aliens, or aliens

in transit, or eager to leave the country. The United States obviously has constitutional power to compel them to testify, and Congress has not manifested an intention to exempt them or anyone else from the obligation imposed by R. S. 102.

B. The argument that as an interned alien enemy, petitioner was a "prisoner of war" and, therefore, entitled under Article 5 of the Geneva Convention to refuse to answer any questions other than name, rank, and regimental number, is defective on several grounds. First, there is no showing that petitioner was "interned" as an alien enemy. Second, the term "prisoner of war" in the context of the Geneva Convention, 47 Stat. 2021, is not applicable to petitioner, who, far from being within the class of captured military personnel or those similarly situated for whom the protection of the Convention was contemplated (Dig. Op. J. A. G. (1912–1940), par. 2180a), was a civilian at liberty in this country throughout the period of hostilities. Finally, Article 5 of the Geneva Convention forbids coercion of prisoners to secure "information relative to the condition of their army or country." The protection afforded by Article 5 is clearly not germane to the inquiry for which petitioner was summoned.

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CONCLUSION

For the reasons stated, we respectfully submit that the judgment below should be affirmed.

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APPENDIX A

BILLS, EIGHTIETH CONGRESS, REFERRED TO COMMITTEE ON UN-AMERICAN ACTIVITIES

Number of bill	Author and date	Title	Action
H. R. 1884	Mr. Rankin, Feb. 12, 1947	To prohibit certain un-American activities	Mar. 24, 25, 26, 27, 28, 1947.—Hearings. July 21 and 22, 1947.—Hearings. No action or recommendations reported by committee.
H. R. 2122	Mr. Sheppard, Feb. 20, 1947	Prohibiting membership in subversive organizations	Mar. 24, 25, 26, 27, 28, 1947.—Hearings. July 21 and 22, 1947.—Hearings. No action or recommendations reported by committee.
H. R. 2275	Mr. Thomas, Feb. 27, 1947	To combat un-American activities by providing for forfeiture of the office or position of any Government employee whose loyalty to the United States is found to be in doubt.	Feb. 27, 1947.—Referred to House Committee on Un-American Activities. No action or recommendations reported by committee.
H. R. 2948	Mr. Dondero, Feb. 5, 1948 (Apr. 3, 1947).	To regulate and control the operation of foreign agencies acting within the United States or its Territories and dependencies.	Apr. 3, 1947.—Referred to the House Committee on the Judiciary (superseding H. R. 478). No action or consideration reported by the Committee on the Judiciary. Feb. 5, 1948.—Discharged by the House Committee on the Judiciary and referred to the House Committee on Un-American Activities.
H. R. 4422	Mr. Mundt, July 26, 1947	To provide that all members of the Communist Party and organizations controlled by it must register as agents of a foreign principal and that all printed matter distributed by such members and organizations shall be clearly labeled as being in compliance with the terms of this legislation, and for other purposes.	Dec. 3, 1947.—Considered by subcommittee on legislation. Feb. 5, 6, 9, 10, 11, 19 and 20, 1948.—Hearings. Mar. 23, 1948.—Considered by subcommittee on legislation.

H. R. 4581	Mr. McDonough, Nov. 25, 1947	To define communism and to make the practice of communism a treasonable act in the United States.	Dec. 3, 1947.—Considered by subcommittee on legislation; supersedes H. R. 99. Feb. 5, 6, 9, 10, 11, 19, and 20, 1948.—Hearings. Mar. 23, 1948.—Considered by subcommittee on legislation.
H. Res. 99	Mr. McDonough, Feb. 12, 1947	To define communism and to provide for exposure of any person adhering to or expounding the purposes and intentions of communism as an enemy of the United States.	Feb. 12, 1947.—Referred to the House Committee on the Judiciary. Mar. 20, 1947.—Discharged from House Committee on the Judiciary and referred to the House Committee on Un-American Activities; no action reported by committee; superseded by H. R. 4581.
H. R. 6554	Mr. Hollfield, May 13, 1948	To protect the United States against un-American and subversive totalitarian activities.	May 13, 1948.—Referred to the House Committee on Un-American Activities. No action or recommendations reported by committee.

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APPENDIX B

BILLS, EIGHTIETH CONGRESS, REFERRED TO OTHER COMMITTEES

Number, author, and date	Title and status
H. R. 1103—Mr. Hobbs, Jan. 20, 1947 (Judiciary).	To make it unlawful for any person to be employed in any capacity, in any department or agency of the Government of the United States created by or by virtue of an act of Congress, whose compensation is paid from funds authorized or appropriated by any act of Congress, who has engaged in activity subversive of the Government of the United States or is or has been a member of or associated with any organization, any part of the aims or purposes of which is or has been subversive to the Government of the United States. Jan. 20, 1947, introduced; Jan. 30, 1947, referred to House Committee on the Judiciary; Mar. 5, 1947, hearings held with reference to; Apr. 1, 1947, reported by subcommittee to the Committee on the Judiciary without recommendation.
H. R. 2286—Mr. Dolliver, Feb., 27, 1947 (Judiciary).	To amend the Nationality Act of 1940. Feb. 27, 1947, 1947, referred to the House Committee on the Judiciary; Feb. 28, 1947, referred to the subcommittee on immigration of the House Committee on the Judiciary; Mar. 1, 1947, report requested from the Department of Justice; June 10, 1947, report received by the subcommittee on immigration of the House Committee on the Judiciary from the Department of Justice; June 30, 1947, hearings by subcommittee on immigration of the House Committee on the Judiciary; Mar. 18, 1948 (Report No. 1378), reported with amendments; committed to the Committee of the Whole House on the State of the Union. Bill pending in House.
H. R. 2540—Mr. Dirksen, Mar. 13, 1947 (Post Office and Civil Service).	To require identification of Communist-front organizations to appear on matter sent, or caused to be sent, by or for them through the mails. Mar. 13, 1947, referred to the House Committee on Post Office and Civil Service; being considered by the committee; no action or recommendations.
H. R. 3363—Mr. Anderson, May 7, 1947 (Judiciary).	To amend sec. 2 (a) of the Alien Registration Act, 1940, with respect to certain subversive activities. May 7, 1947, referred to the House Committee on the Judiciary; May 14, 1947, report requested from Department of Justice; Dec. 16, 1947, report received from Department of Justice; no action reported by committee.
H. R. 3529—Mr. Boggs, May 20, 1947 (Judiciary).	Prohibiting members of certain subversive organizations from being members of any labor organization, and for other purposes. May 20, 1947, referred to the House Committee on the Judiciary; no action taken or recommendations reported by committee.

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Number, author, and date	Title and status
H. R. 4339—Mr. Mundt, July 23, 1947 (Judiciary).	To amend the Foreign Agents Registration Act of 1938, as amended, to require all members of the Communist Party to register under such act, to provide that all printed matter distributed by such members shall be clearly labeled, and for other purposes. July 23, 1947, referred to the House Committee on the Judiciary; no action taken or recommendations reported by committee.
H. R. 4483—Mr. Cole, Nov. 17, 1947 (House Administration).	To bar un-American parties from the election ballot. Nov. 17, 1947, referred to House Committee on House Administration. Jan. 16 and 20, 1948, hearings held; now pending before subcommittee on elections. No action taken or recommendations made by committee.
H. R. 5216—Mr. Cole, Jan. 30, 1948 (Joint Committee on Atomic Energy).	To amend the Atomic Energy Act of 1946 so as to provide that no person shall take office as a member of the Atomic Energy Commission or as General Manager of such Commission until an investigation with respect to the character, associations, and loyalty of such person shall have been made by the Federal Bureau of Investigation. Feb. 2, 1948 (Report No. 1290), committed to the Committee of the Whole House on the State of the Union and ordered to be printed. Feb. 17, 1948, put on consent calendar. May 3, 1948, called on consent calendar; by unanimous consent of the House, S. 1004, having already passed the Senate, was substituted in lieu thereof and passed by the House. Vetoed by the President. May 20, 1948, veto sustained.
H. R. 5460—Mr. McMahon, Feb. 14, 1948 (House Administration).	That the Communist Party shall not be recognized, or qualified to participate, or permitted to have the name of any candidate printed on the ballot, in the election in the United States of America. Hearings held Jan. 16 and 20 1948. No action taken or recommendations reported by the committee.
H. R. 6126—Mr. Michener, Apr. 6, 1948 (Judiciary).	To amend the Alien Registration Act of 1940. Referred to subcommittee on Immigration and Naturalization; companion bill to S. 2432; no action or recommendations reported by comm2tee.
S. 1175—Mr. Baldwin, Apr. 28, 1947 (Senate Judiciary).	To make it a crime to receive money, compensation consideration, or thing of value for advocating of the overthrow of any government in the United States Apr. 28, 1947, referred to Senate Committee on the Judiciary; pending consideration before the Subcommittee on Immigration of the Senate Committee on the Judiciary; no action taken or recommendations reported by the subcommittee or by the committee.
S. 2412—Mr. Wherry, Mar. 30, 1948 (Senate Judiciary).	To protect the people of the United States against infiltration by Communists and Communist-front organizations. No action or recommendations reported by committee.
S. 2432—Mr. Wiley, Apr. 2, 1948 (Senate Judiciary).	To amend the Alien Registration Act of 1940. Passed Senate, May 10, 1948; May 11, 1948, referred to the House Committee on the Judiciary; no action or recommendations reported by House committee.

U. S. GOVERNMENT PRINTING OFFICE: 1948

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 255

GERHART EISLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM SUGGESTING DISMISSAL OF THE WRIT OF CERTIORARI

The Attorney General and the Solicitor General submit this memorandum for the purpose of suggesting the propriety of dismissing the writ of certiorari in this case because of the petitioner's flight from justice.

This proceeding originated with the petitioner's indictment in the United States District Court for the District of Columbia for a violation of R. S. 102 (2 U. S. C. 192). After a trial before a jury, the petitioner was found guilty and sentenced to imprisonment for one year and to pay a fine of $1,000 (R. 229). The Court of Appeals for the District of Columbia affirmed the

judgment (R. 233–245). On November 8, 1948, this Court, in the exercise of its discretion, granted a petition for a writ of certiorari (R. 253). Briefs have been filed, and argument heard by this Court on March 28, 1949, but no decision has been announced. The petitioner was at large on bail pending the decision in this case, and was also on bail pending appellate review of his conviction on another charge involving the making of false statements in connection with an application for an exit permit.[1]

On May 6, 1949, the petitioner fled the United States and has not returned to its jurisdiction.[2] On May 17, 1949, the District Court declared the petitioner's bail in both cases forfeited.

In these circumstances, it is suggested that it may be appropriate for this Court to dismiss the writ of certiorari heretofore granted. Since review on writ of certiorari is not a matter of right, but of sound judicial discretion, such a disposition is clearly within the power of the Court. Cf. *Smith* v. *United States*, 94 U. S. 97.

Dismissal of the writ in these circumstances would be in harmony with the practice of this Court and of other American courts exercising

[1] The petitioner was sentenced to imprisonment for one to three years on the latter charge.

[2] The petitioner is now being detained in Great Britain pending proceedings to secure his extradition on the other charge. Under the provisions of the Extradition Treaty of December 22, 1931, between the United States and Great Britain, the petitioner is not subject to extradition for the offense involved in the instant case. 47 Stat. 2122.

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appellate jurisdiction. Cf., e. g., *Smith* v. *United States, supra, Bonahan* v. *Nebraska,* 125 U. S. 692; *Allen* v. *Georgia,* 166 U. S. 138 (holding that the action of a state Supreme Court in dismissing a writ of error because the accused had become a fugitive from justice was not a denial of due process); *People* v. *Genet,* 59 N. Y. 80; *State* v. *Spry,* 126 W. Va. 783. See American Law Institute, Code of Criminal Procedure, Official Draft (1930) § 442 and Commentary, p. 1236. Such a disposition of the appeal of one who is a fugitive from justice is founded upon strong considerations of judicial policy. Some of these considerations were cogently summed up by this Court in *Allen* v. *Georgia, supra,* at p. 141:

> Otherwise [*i. e.,* if the writ is not dismissed] he is put in a position of saying to the court: "Sustain my writ and I will surrender myself, and take my chances upon a second trial; deny me a new trial, and I will leave the State, or forever remain in hiding." We consider this as practically a declaration of the terms upon which he is willing to surrender, and a contempt of its authority, to which no court is bound to submit.

In the instant case, petitioner has induced this Court to exercise its discretion, by way of writ of certiorari, to review a judgment which would otherwise have been final. Taking advantage of his freedom on bail, which was possible only

because of the additional time required for proceedings in this Court, he has fled from the country and has attempted to render nugatory any judgment that might be rendered against him. Since the writ of certiorari is issued only in the sound discretion of this Court, it would be highly appropriate for the Court, in the light of these recent events, to exercise its discretion to dismiss the writ.

Respectfully submitted.

TOM C. CLARK,
Attorney General.

PHILIP B. PERLMAN,
Solicitor General.

MAY 20, 1949.

U. S. GOVERNMENT PRINTING OFFICE: 1949

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. —

GERHART EISLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION TO DISMISS THE WRIT OF CERTIORARI

The Solicitor General moves that the writ of certiorari, heretofore granted to review this case, be now dismissed.

The facts pertinent to this motion appear in the opinions in *Eisler* v. *United States,* 338 U.S. 189, 190. Briefly stated, Eisler, having been convicted of a violation of R. S. 102 (2 U.S.C. 192) and his conviction having been affirmed by the Court of Appeals for the District of Columbia Circuit (170 F. 2d 273), petitioned this Court for a writ of certiorari, which was granted. 335 U.S. 857. Briefs

were filed and the case was argued orally, and thereafter, on May 6, 1949, before any decision was announced, Eisler fled the United States. On June 27, 1949, a majority of the Court, in passing upon a memorandum of the United States suggesting dismissal, ordered the cause "left off the docket until a direction to the contrary shall issue." 338 U.S. at p. 190.[1]

Since then, we are informed that Eisler has accepted public office in the Soviet Zone of Germany and otherwise given further evidences, if any were needed, of his intention to stay out of the jurisdiction of this Court. It is submitted that it is appropriate for this Court to issue the "direction to the contrary", mentioned in its prior opinion, dismissing the writ of certiorari.

Such action is indicated by the actual practice of this Court. The opinion of a majority of the Court, disposing of the memorandum filed by the United States, cited *Smith* v. *United States,* 94 U.S. 97, and *Bohanan* (*Bonahan*) v. *United States,* 125 U.S. 692,[2] as establishing the practice of the Court

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[1] The Chief Justice and Mr. Justice Frankfurter dissented, believing that the writ should have been dismissed for lack of jurisdiction. 338 U.S. at pp. 190-193. Mr. Justice Murphy and Mr. Justice Jackson expressed, in separate dissenting opinions, the view that the case should have been decided on the merits. 338 U.S. at pp. 193, 195.

[2] Although the name of the plaintiff in error appears as "Bonahan" in the official report, examination of the Minutes of the Court for the 1887 Term reveals that his name was actually Bohanan. See Transcript of Records (1887) Vol. 16, p. 13417.

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in cases such as this. 338 U.S. at p. 190. The official report of the *Smith* case, which was said to establish the practice of the Court in this situation,[3] does not accurately disclose the nature and course of the proceedings therein, as appears from an examination of the Minutes and Docket of this Court. The *Smith* case is authority for *dismissal,* and for no other practice.

Smith was convicted of murder under the laws of the then territory of Washington and his conviction affirmed by the Supreme Court of that Territory. 1 Wash. Terr. Rep. 262. He thereupon sought and obtained from this Court a writ of error under the then applicable statutes and rules, and in the form then in use. R. S. (ed. 1873-1874) §§ 997, 999, 1003. See Robertson, *Appellate Practice and Procedure in the Supreme Court of the United States* (1928 ed.) pp. 94-102. A certified transcript of the record of Smith's trial was filed in the office of the Clerk of this Court as No. 453 of the December Term, 1870. Thereafter, while decision on the writ of error was pending, Smith escaped from custody.[4] The Minutes of the Court for the year 1876 show

---

[3] The Court in the *Bohanan* case simply followed the precedent supposedly established by the *Smith* case. 125 U.S. at p. 692.

[4] The precise date of Smith's escape does not appear either in the opinion of Chief Justice Waite or in the Minutes of the Court. The Attorney General of the State of Washington states, by letter dated August 4, 1949, that diligent search of the records of the State throws no further light on the details of Smith's evasion or his eventual fate.

that on October 10, 1876, the writ of error was dismissed. On November 20, 1876, however, on motion of Smith's counsel, the Court ordered that its judgment of October 10th be rescinded and the cause reinstated upon the docket. On November 27, 1876, the Court, per Chief Justice Waite, denied the motion of Smith's counsel to assign a day for argument and further "ordered that unless the plaintiff in error shall submit himself to the jurisdiction of the court below, on or before the 1st day of the next term of this Court, that the cause will be again *dismissed.*" (Italics supplied.) This is obviously the order which resulted from the opinion reported at 94 U.S. 97, and it is apparent that, while Chief Justice Waite, in his reported opinion, spoke of leaving the case off the docket after the deadline, the Court actually ordered the writ to be dismissed after such date. And this is conclusively confirmed by the Docket of the Court for the October Term, 1877, which shows that on October 9, 1877, which was at the beginning of the next term afer the opinion, the writ was "adjudged to be dismissed."

The fact is, therefore, that the *Smith* case was twice *dismissed* by this Court, and was not at any time merely left off the docket, as the opinion intimated would be done, unless, by the use of that phrase, the Court meant dismissal.

Since the petitioner has taken no steps to submit himself to the jurisdiction of this Court and

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has not evinced the slightest intention of so doing at any foreseeable time in the future, it is respectfully submitted that the Court should now follow the precedent established in the *Smith* case and dismiss the writ of certiorari heretofore granted in this case.

PHILIP B. PERLMAN,
Solicitor General.

OCTOBER, 1949.

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IN THE

Supreme Court of the United States

October Term, 1948

No. 255

GERHART EISLER, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS WRIT OF CERTIORARI

The government's motion discloses only one change of circumstances since the Court acted on this matter last term. That is that Eisler has accepted public office in the Soviet Zone of Germany.

Whatever significance this fact has is entirely of a political nature. While its recitation may be of a piece with the political nature of the prosecution, the matter hardly seems one for the Court to consider.

No occasion appears therefore for the Court to change the order it last entered. But since the government has chosen, for undisclosed reasons, to reopen the matter, we believe it appropriate to repeat that in our opinion the best traditions of the Court and the public interest would be served by a decision of the case on the merits. In this respect we share the views expressed by Mr. Justice Murphy and Mr. Justice Jackson, dissenting, in *Eisler v. United States*, 338 U. S. 189, 190-193.

Respectfully submitted,

DAVID REIN
JOSEPH FORER
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 255.

GERHART EISLER, *Petitioner*,

v.

THE UNITED STATES OF AMERICA, *Respondent*.

BRIEF OF NATIONAL LAWYERS GUILD AS AMICUS CURIAE.

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IN THE

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OCTOBER TERM, 1948.

No. 255.

GERHART EISLER, *Petitioner*,

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THE UNITED STATES OF AMERICA, *Respondent*.

BRIEF OF NATIONAL LAWYERS GUILD AS AMICUS CURIAE.

STATEMENT.

The National Lawyers Guild is a bar association with membership throughout the United States. Its constitution proclaims it to be a "professional organization which shall function as an effective social force in the service of the people to the end that human rights shall be regarded as more sacred than property rights." It is pledged "to protect and foster our democratic institutions and the civil rights and liberties of all the people."

The issues herein presented are imbued with grave implications affecting the fundamental freedoms and immunities guaranteed by the Constitution. The National Lawyers Guild believes that the denial of certiorari in this case would leave unreviewed a decision which makes a vital departure from the constitutional principles established by

this Court, and would destroy protection heretofore afforded to our basic democratic institutions and the civil rights and liberties of all the people. For these reasons, it has secured the consent of the parties to the filing of this brief as amicus curiae.

Although this case presents many important and substantial questions, with which this bar association is vitally concerned, this brief will confine itself to the sole question:

> Did the trial court err by failing to disqualify itself upon the filing of the affidavit of bias and prejudice?

A fair trial is the *sine qua non* of American jurisprudence. Such a trial cannot take place before a prejudiced judge. If the statute permitting a party to file an affidavit of bias and prejudice is to be construed in accordance with the view of the majority of the court of Appeals in this case, the assurance of a trial before an unprejudiced judge intended to be provided by it, will be largely destroyed. Upon an issue of such transcendant significance it is our view that this Court should provide the fullest guidance.

SUMMARY OF ARGUMENT.

The allegations set forth in the affidavit of prejudice gave rise to a fair inference of bias and prejudice. The statutory requirements were complied with and it was error for the trial court not to disqualify itself. Such a statute demands a liberal construction.

ARGUMENT.

The Court Erred in Failing to Disqualify Itself on the Ground of Personal Bias and Prejudice.

The affidavit of prejudice averred *inter alia* that the trial Judge while employed in the Department of Justice, was assigned to the Federal Bureau of Investigation; that his duties were concerned especially with the investigation by the latter into the activities of aliens and communists, (the

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defendant being in both of these categories); and that he had been the active legal advisor to the investigator in the very investigation upon which the defendant was subsequently tried.

The Court of Appeals held in another case that the same trial judge should have disqualified himself on a virtually identical affidavit (*Barsky* v. *Holtzoff*, April Term, 1947, Misc. 126, U. S. App., D. C., decided June 11, 1947). We share fully the view of Mr. Justice Prettyman that the legal sufficiency of the affidavit itself, is clear. Under the circumstances alleged it is certainly reasonable to infer the bias and prejudice of the trial judge. To compel one accused to proceed to trial before a judge thus reasonably challenged is to injure the confidence the people must have in the impartiality of our judicial system.

Only the naked question remains open, as to whether the statute should be so narrowly construed as to treat the affidavit as a nullity on the grounds of untimeliness. In our view such a construction would defeat the Congressional intent.

Only eight days elapsed from the time defendant's counsel were first advised that Justice Holtzoff would preside at the trial to the filing of the affidavit. The statute requires the filing of the affidavit 10 days before the term of court. This is obviously upon the assumption that the identity of the trial judge is known for a reasonable period of time more than ten days before the beginning of the term. Since the District Court for the District of Columbia is in continuous session, the only practical way to give effect to the statute is to allow a reasonable time after counsel knows or should know of the identity of the trial judge. It is clear from the record that the affidavit here was filed with all due diligence, considering the facts and circumstances of this case.

This Court said in the Berger case (255 U. S. at 35, 36), "the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial." If the legal sufficiency of the

affidavit be granted, the interests of justice require the judge challenged not sit unless unless the most compelling reasons of justice make it necessary that he shall do so. This means that such disqualifying statutes must receive the most liberal construction. Such construction will not lead to abuse, for, as this court said in the Berger case (supra—at page 35), "what concern is it to a judge to preside in a particular case? Of what concern to other parties to have him so preside." Only one trial court can be so challenged.

Because of the eloquent statement of the high public interest in the issue here discussed we quote from the opinion of a lower State Court:

> "In the administration of justice it is not only requisite that a judge should be honest, unbiased, impartial and disinterested in fact, but equally essential that all doubt or suspicion to the contrary should be jealously guarded against and eliminated. Not only is it the duty of a judge to render a righteous judgment but it is of transcendent importance to the litigants and the public generally that there should not be the slightest suspicion as to his fairness and integrity. Caesar demanded that his wife should not only be virtuous but beyond suspicion. The people should not exact less from the judiciary, the most powerful branch of our Government.
>
> "Disqualifying statutes should not receive a technical or strict construction but should be interpreted liberally." *The People ex rel. Union Bag and Paper Corporation* v. *Perry M. Gilbert et al.* 143 Misc. (N. Y.) 287.

It is due to the decisive importance of an impartial Court to the true administration of justice that the National Lawyers Guild deemed it essential to intervene in this case. If the Court's own view of its subjective state of impartiality can be a factor in determining whether or not a trial Court shall disqualify itself upon the filing of an affidavit of prejudice pursuant to the statute, then the salutary effect of the statute is bound to be defeated. For it is precisely the Court which is prejudiced that is most likely to

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decide that the affidavit is not filed in good faith, or that the inferences logically drawn from its allegations, are unfounded.

Particularly in the present period, with the ever increasing intensity of anti-communist hysteria utmost vigilance and care must be exercised that such hysteria is not allowed to permeate into the court room and affect either judge or jury. The disqualifying statute under consideration here can serve as some protection against this danger, if it is liberally construed. If the construction applied to the statute by the Court below is allowed to stand, by the denial of a writ of certiorari, or otherwise, this safeguard of the most fundamental right to a fair trial will become all but meaningless. In that event the confidence of the people in the integrity of our judicial system may well be impaired. For these reasons we believe that the interests of justice require that a writ of certiorari should be granted in this case.

Respectfully submitted,

NATIONAL LAWERS GUILD,
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President.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1948

No. 255

GERHART EISLER,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*, FOR LEAVE TO ARGUE THEREON, AND BRIEF *AMICI CURIAE* ON BEHALF OF EDWARD K. BARSKY, *ET AL.*

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IN THE

Supreme Court of the United States

OCTOBER TERM—1948

No. 255

GERHART EISLER,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND FOR LEAVE TO ARGUE THEREON

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners herein pray that they be granted leave to file a brief *amici curiae* and to argue thereon in the instant case.

All of the petitioners except the petitioner Helen R. Bryan are members of the Executive Board of the Joint Anti-Fascist Refugee Committee, an unincorporated association with offices at 192 Lexington Avenue, New York City.

The petitioner Helen R. Bryan is Executive Secretary of the Joint Anti-Fascist Refugee Committee.

All the petitioners except the petitioners Ernestina Fleischman and Helen R. Bryan have been convicted of a violation of Section 192, Title 2 of the United States Code involving a contempt of the House Committee on Un-American Activities, and after affirmance of conviction by the Court of Appeals for the District of Columbia certio-

rari was denied by the Supreme Court of the United States on June 14, 1948. On June 22, 1948, a petition for rehearing was filed with this Honorable Court on which decision is still pending.

The petitioners Bryan and Fleischman were also convicted of a violation of 2 U. S. C. 192, involving a contempt of the aforementioned House Committee. Argument in their cases has been held before the United States Court of Appeals for the District of Columbia, and decision is pending. One of the issues involved in the instant case, as in the case of each of the petitioners herein, is that of the constitutionality of the House Committee on Un-American Activities. The decision in the instant case will, therefore, vitally affect the cases of each and all the petitioners. The importance of the issues involved has led the petitioners to request that in addition to being given permission to file the accompanying brief *amici curiae*, counsel for petitioners be permitted to argue upon the said brief at the time of oral argument in the instant case.

Permission has been given by counsel for the petitioner Eisler and for the Government to submit this brief and to ask for leave to argue thereon.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM—1948

No. 255

GERHART EISLER,

Petitioner,

v.

UNITED STATES OF AMERICA.

BRIEF ON BEHALF OF EDWARD K. BARSKY, *ET AL.*, AS *AMICI CURIAE*

The facts in the instant case are fully set forth in the petition for certiorari of the petitioner Eisler and need not be repeated here. This brief addresses itself to the question of the unconstitutionality of the House Committee on Un-American Activities (hereinafter sometimes called "The House Committee" or "the Committee"), which is one of the points argued by the petitioner Eisler in his brief. This point is also at issue in the cases of each of the petitioners as mentioned in the petition attached hereto.

More specifically, this brief will concern itself with the particular question of whether the statute creating the House Committee on Un-American Activities (hereinafter called "the Resolution") (Sec. 121(b), Legislative Reorganization Act of 1946, P. L. 601, c. 753, 79th Cong., 2d Sess., 60 Stat. 828, amending Rule XI(1)(q)(2) of the Rules

of the House of Representatives),* was unconstitutional in that the resolution violates the Fifth and Sixth, the First, the Ninth and Tenth Amendments to the United States Constitution.

A

The Resolution violates the Fifth and Sixth Amendments to the United States Constitution.

The language of the Resolution sets up the following "matter under inquiry";

(1) "propaganda activities" which are
  (a) "un-American";

(2) "Propaganda" which is
  (a) "subversive and un-American"
  (b) "and attacks the principle of the form of government as guaranteed by our Constitution."

The defect of this language is not so much that it sets up vague, general, equivocal and impractical standards, but rather that it sets up no recognizable standard. This conclusion will appear from the demonstration that the key terms used are unknown to the law and have acquired no specialized or technical meaning and have acquired no meaning "by general acceptation", a standard suggested by CARDOZO, *J.*, in *Schecter Poultry Corp.* v. *United States*, 295 U. S. 495, 552 (1935). Indeed, as late as 1946, eight years after the House Committee was established, the Chief Counsel of the House Committee wrote to a member of Congress, under date of July 18, 1946, as follows:

* The House Committee was previously established under successive Resolutions of the House of Representatives: House Resolution 5, 79-1, 91 C. R. 10, 15 (1945); H. R. 282, 75-31, 83 C. R. 7568, 7586 (1938); H. R. 26, 76-1, 84 C. R. 1098, 1128 (1939); H. R. 321, 76-3, 86 C. R. 572, 605 (1940); H. R. 90, 77-1, 87 C. R. 886, 899 (1941); H. R. 420, 77-2, 88 C. R. 2282, 2297 (1942); H. R. 65, 78-1, 89 C. R. 795, 810 (1943).

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> "The committee has adopted no definition of subversive or un-American activities" (79-2 Daily C. R. A., 5013, 1 August, 1946).

The key term employed—"un-American"—is commonly considered as an epithet, not a term of clear meaning. The President's Advisory Committee on Universal Training, confronted with the contention that universal military training is "un-American", stated:

> "An epithet is not an argument. Un-American means simply that it has not been done before in America. If Americans want it, it becomes American."
>
> ("A Program For National Security", Report of the President's Advisory Committee on Universal Training (1947) 39).

The latitude which the House Committee enjoyed in the definition and application of the terms of the Resolution compelled a member of the Committee, Rep. Voorhis, to point out in a minority report:

> "All the minority is contending for is the right of loyal American citizens to disagree politically with a majority of the Dies Committee without being branded as subversive and un-American" (77-2 H. Rep. 2277, p. 7, 25 June 1942).

These observations as to the lack of meaning of the terms in the Resolution are confirmed by a thorough and complete analysis in a Columbia Law Review Note for April, 1947 (Note 47, Columbia Law Review, 419-423). The author of the Note reached the conclusion that the Resolution is vague and indefinite in scope only after exploring every possible source of definition. Thus, unable to find a dictionary definition of the determinative terms of the Resolution, the author of the Note examines the various other statutes employing those terms and concludes that the words "un-

American" and "subversive" have "unsettled meanings" (47 Columbia Law Rev., 421), and that the Supreme Court was unable to define the "principle" of our "form of government" so as to give meaning to the expression "propaganda . . . (which) attacks the principle of the form of government as guaranteed by our Constitution" (*Schneiderman* v. *United States*, 320 U. S. 118 (1943)). And an inquiry into previous investigations of a similar nature revealed that they were framed in narrower terms than the Resolution and the inquiries conducted were much more limited than that of the House Committee (47 Columbia Law Rev., 421). Moreover, the Congressional debates "provide no satisfactory indication of the scope of its (the House Committee) power", instead they reveal "that the House had no clear intent as to the subject matter to be investigated"—indeed, the Committee was purposefully accorded "a roving commission to inquire into any propaganda activities which a majority of the Committee thought warranted investigation" (47 Columbia Law Rev., 421-422).

The most graphic picture of the unlimited scope of investigation which the House Committee deems itself authorized to make is found in the welter of contradictory statements which it has made from time to time in its reports.

Its 1939 Report suggests that the following are un-American: "absolute social and racial equality"; "the destruction of private property and the abolition of inheritance," apparently irrespective of the means employed or advocated; and "the substitution of communal ownership of property for private ownership"; "the duty of government to support the people"; "bureaucratic and paternalistic governments"; "a system of planned economy"; "collectivism"; "collectivistic philosophy; the promise of economic security"; "political, economic, or social regimentation"; and "the destruction of the American system of checks and balances with its three inde-

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pendent coordinate branches of government" (76-1, H. Rept. 2, Jan. 3, 1939, at p. 12).

In its wartime Report of 1942, the distinction drawn in the above Report seems to have been ignored. The Report attacked an organization, not on the ground that it was foreign-controlled, or enemy-controlled, but because its propaganda, critical of members of Congress, was designed to bring Congress itself into disrepute, and also because of the "company" the organization had attracted (77-2 H. Rept. 2277, 25 June, 1942). The minority report of Mr. Voorhis comments:

> "Once, however, the committee undertakes to accuse people of un-American activities because they criticize certain features of our economy or say unkind things about finance capitalism or because they come out for a greater degree of cooperation in our economic life, it is in danger of becoming an agency which arrogates to itself the right to censor people's ideas. That in itself is un-American."

Its wartime Report of 1943 (77-2 H. Rept. 2748, Jan. 2, 1945) indicates that the following may constitute un-American propaganda activity: "Joining Communist Front groups," apparently irrespective of the activity of the group (*id.*, p. 3); "endeavoring to secure American support for Russia's foreign policy" (*id.*, p. 10); broadcasts by commentators who "have shown that they would like to see another civil war created in one country of Europe in order to re-establish a communistic regime" (*id.*, p. 10); criticism of General MacArthur and of Chiang Kai-Shek (*id.*, p. 10); advocating the "creation of a world state which would embrace Socialism or Communism" (*id.*, p. 10) "calling for the dissolution of the British Empire" (*id.*, p. 10); severe criticism of many individual members of Congress and of Congress as a whole (*id.*, p. 13); propaganda containing "the suggestion that any native-born person who claims to be 100 percent American is either a

Fascist or is likely to become one very shortly" (*id.*, p. 14); the fact that "in a recent book he viciously attacked cartels, making libelous accusations aginst the Standard Oil Company of New Jersey and other responsible industrial organizations which made such extensive contributions to the war effort" (*id.*, p. 35); "The lies and deceits used by the Spanish front organizations and their propaganda to create in the minds of the people of America the impression that the streets of Spain are covered with blood" (*id.*, p. 49). Two-thirds of the Committee's Report is devoted to material relating to Spain, the tenor of which suggests that opposition to General Franco is indicative of un-American activity.

The Congressional debates which failed to ascribe any meaning for "un-American" indicate that the word "subversive" is as undefinable.

After almost five years of investigation and Committee Reports by the previous Committee, a member of the House found it necessary to ask on the floor of the House during the debate on the continuance of the Committee what "subversive" meant:

> "Mr. Outland: Just what are subversive activities?
>
> Who is to be the judge? There have been people who have called the chairman of the Committee subversive, which in my opinion is entirely incorrect. But the permitting of individual interpretation of just what is deemed subversive is a dangerous and un-American thing" (78-1 C. R. 806).

No answer to this question is recorded; indeed, as the word is used, none can be given.

A "Special Report on Subversive Activities Aimed at Destroying our Representative Form of Government" by a predecessor Committee, does no more to remove the meaning of "subversive" or "our representative form of

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government" from the realm of conjecture. The Report was devoted principally to the "exposure" of an organization which had issued a score card or rating card of the individual members of Congress, which apparently was severely critical of many individual members and of the record of the Congress (77-2 H. Rept. 2277).

As to the Committee's understanding of its powers with respect to the phrase "attacks the principle of the form of government as guaranteed by our Constitution," Representative Wood, when chairman of the Committee, stated at one of its hearings that "the committee is empowered to investigate any activities of any organization or any individual. The committee conceives it to be within its scope to investigate the activities of any organization that expounds *American* (*sic*) principles of government." *Hearings on Communist Party,* Committee on Un-American Activities, H. Res. 5, 79th Cong., 1st Sess., Sept. 27, 1945, p. 31 (italics added).

Truly, the Committee lays no restraints whatsoever upon its powers of investigation.

The evidence thus amply sustains the conclusion "that the intent of Congress was to give the Committee absolute discretion in its probe" and "not to restrict the Committee by giving an explicit meaning to the authorizing enactments" (47 Columbia Law Rev., 423). For after searching for meanings which may be properly attributed to the words "un-American," "subversive" and "attacks the principle of the form of government as guaranteed by our Constitution," we may now conclude that in sober fact the vice of the Resolution here involved is that it sets no standard whatever for determining the scope of the investigation authorized. Whim, opportunism, expedience, prejudice—these are the standards governing the Committee.

These standards are not definable, delimitable or in any way restrictive. Indeed, when on April 8, 1937, a proposed

House resolution which placed the term "un-American" within a limiting context was defeated (H. R. 88, 75-1, C. R. 3048, 3283, 3290), the member in charge of the proposed resolution, in reply to a question as to the meaning of "un-American," stated:

> "The Committee may read this resolution and put whatever interpretation they see fit upon it without any limitation so far as I am concerned" (75-1, C. R. 3285).

This is not a definition by usage or general acceptation; this is *ad hoc,* subjective definition. It is improper thus to accord the House Committee the unlimited power of defining the words, "un-American," and "subversive,"* the basis upon which men may be compelled to appear, testify, and produce books and records; be subjected to the harassment and notoriety frequently attached to a House Committee hearing; and be publicly exposed and denounced as politically "dangerous."

In the case of *U. S.* v. *Barsky,* 167 F. (2), pages 247-248, 260-261, involving most of the instant petitioners, the Court of Appeals for the District of Columbia, in its opinion indicated that the term "un-American" is, in fact and law, too vague to be valid. Furthermore, this Court in *Winters* v. *New York,* 333 U. S. 507, indicated that it considered "subversive activities" too indefinite as a standard of guilt.**

The majority opinion in the *Barsky* case nevertheless concluded that the Resolution was a valid delegation of Power by the Congress to the House Committee since the instruction therein to the House Committee to investigate propaganda which "attacks the principle of the form of government as guaranteed by our Constitution . . .," ". . . is definite enough". 167 F. (2), pages 247-248, 260-

* See Emerson and Helfeld, *Loyalty Among Government Employees,* 58 Yale L. J. 1, 39, 40 (1949).

** See Emerson and Helfeld, *Loyalty Among Government Employees,* 58 Yale Law Journal 42-43 ff. (1949).

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261. Yet this Court was unable to isolate any "principles of the Constitution" in *Schneiderman* v. *United States*, 320 U. S. 118 (1943). There, Mr. Justice MURPHY stated:

> "Criticism of, and the sincerity of desires to improve the Constitution should not be judged by conformity to prevailing thought because, 'if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate.'" 320 U. S. at 138.

As Judge EDGERTON stated in the *Barsky* case with respect to the use in the Resolution of this clause:

> "The enabling Act uses the word 'subversive,' the word 'attacks,' and the words 'the principle of the form of government as guaranteed by our Constitution,' but it uses none of them independently of the word un-American. Moreover, the quoted words themselves have no reasonably clear meaning. Does 'the principle of the form of government' here mean the republican or democratic principle only, or does it include e. g. the constitutional legislation? This court puts a plural where Congress put a singular, and says 'the principles • • • are obvious.' To me it is not obvious how much Congress meant by 'the principle,' or how much the court means by 'the principles,' or that the two meanings are identical. Both because 'the principle' is vague and because 'attacks' is vague, I do not know whether propaganda 'attacks the principle' if, e. g., it advocates a constitutional amendment replacing the American principle of judicial review by the British principle of legislative supremacy. Neither do I know whether the kind of propaganda with which the House Committee undertook to connect the appellants through their records 'attacks the principle.' A member of the Communist Party who advocates sweeping constitutional changes may, in the Supreme Court's view, be 'attached to the principles of the Constitution' within the mean-

ing of those words in a naturalization act." 167 F. 2d at 262.

The "principles" or the principle of our government are, indeed, almost incapable of exact definition. But if there is anything genuinely "un-American" or contrary to the "principles" of our constitution, it can be said with some degree of confidence that it is the vigorous attempt by the "House Committee on Un-American Activities" to enforce a rigid and narrow political orthodoxy on this free land of ours.

Guilt or innocence of the action of witnesses before the House Committee depends upon the meaning of the key terms of the Resolution. For it is necessary to refer to the Resolution in order to determine whether petitioners committed a crime under Section 192, Title 2 of the United States Code. The Resolution provides the standard of guilt under Section 192 and, accordingly, the Resolution must conform with the constitutional requirements of definiteness and certainty which pertain to any penal law. *Kraus & Bros.* v. *United States*, 327 U. S. 614 (1946). Because of the lack of definiteness of the terms of the Resolution, discussed previously, the Resolution entirely fails to meet those requirements and thereby violates the Fifth and Sixth Amendments to the United States Constitution. *Kraus & Bros.* v. *United States*, 327 U. S. 614 (1946); *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939); *Cline* v. *Frink Dairy Co.*, 274 U. S. 445 (1927); *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 (1921); *United States* v. *Reese*, 92 U. S. 214 (1875). Nor may this defect in the Resolution be cured by the judicial construction of this Court. *United States* v. *Reese*, 92 U. S. 214 (1875); *Butts* v. *Merchants & Miners Transportation Co.*, 230 U. S. 126 (1913); *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500 (1926); *United States* v. *Sullivan*, 332 U. S. 689, 693 (1948).

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The Court should therefore declare the Resolution unconstitutional as in violation of the Fifth and Sixth Amendments to the Constitution.

B

The Resolution violates the First Amendment to the Constitution of the United States.

That the investigations into "propaganda activities" authorized by the Resolution and conducted by the House Committee abridges speech, press and assembly, was assumed by the majority and dissenting opinions of the Court of Appeals in the *Barsky* case; nor was it disputed in that case that the First Amendment limits the Congressional investigatory power. *Barsky* v. *U. S., supra,* 167 F. 2d at 246; cf. *Colonial Sugar Refining Co.* v. *Attorney General,* 15 Commonwealth L. R. 182 (1912) *rev'd* L. R. (1914) App. Cas. 237; *Greenfield* v. *Russel,* 292 Ill. 392, 127 N. E. 102 (1920); see *Jones* v. *Opelika,* 316 U. S. 584, 600, 609 (1942). The same principle should be applicable in the instant case of the petitioner Eisler.

Public inquiries into matters of opinion and expression protected by the First Amendment are prohibited by that Amendment.* *United States* v. *Ballard,* 322 U. S. 78 (1944), see *Cummings* v. *Missouri,* 71 U. S. 277, 331 (1867). As stated in the dissent of Edgerton, *J.*, "No one denies

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* Prior to the adoption of the First Amendment, at the trial of Anne Hutchinson in 1637 before the General Court at Newton in the Province of Massachusetts-Bay, the following colloquy occurred:

> "*Gover.* Only I would add this. It is well discerned to the court that Mrs. Hutchinson can tell when to speak and when to hold her tongue. Upon the answering of a question which we desire her to tell her thoughts of she desires to be pardoned.
>
> *Mrs. H.* It is one thing for me to come before a public magistracy and there to speak what they would have me to speak and another when a man comes to me in a way of friendship privately there is difference in that."

(*Abramowitz, The Great Prisoners,* 316 (1946).)

that the inquest is an effective instrument of restraint" *Barsky* v. *U. S., supra,* 167 F. 2d at 260. The House Committee inquiry, motivated by "sheer animosity and excited partisanship" (Ehrmann, "The Duty of Disclosure in Parliamentary Investigation" 11 *U. of Chic. Law Rev.* 1, 117, 150 (1944)) and conducted in a manner violative of procedural due process (see *Ogden, The Dies Committee,* c. IV, VIII, IX, XIII, XVII (2 ed. 1945); *Gellerman, Martin Dies,* c. 4, 5 (1944); *Cushman, Safeguarding Our Civil Liberties,* 7-8 (1943); 94 Cong. Rec. 2487, 2490, 2493, 2495 (1948); Notes, 96 *U. of Penn. Law Rev.* 381, 395 (1948); 14 *U. of Chic. Law Rev.* 256, 263 (1947); 47 *Columbia Law Rev.* 416, 428 (1947); *N. Y. Times,* Oct. 8, 1947, p. 7, col. 5 (RIFKIND, *J.*); *N. Y. Herald Tribune,* March 14, 1948, p. 22, cols. 6-8 (Archibald MacLeish)), is such "an effective instrument of restraint."

Compulsory public disclosure of constitutionally guaranteed opinion and expression is another aspect of the Committee's activities which is limited by the First Amendment. *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624 (1943). The compulsory public disclosure of unorthodox opinions and speech is a patent restraint thereupon. Under the Resolution the Committee not only restrains the unorthodox by compulsory disclosures but restrains more orthodox views or speech by publicly characterizing any individual or organization* distasteful to the House Committee (or its members) as "subversive," "un-American," or "communistic" (H. Report 2277, 77th Cong., 2nd Sess., Minority Report 4, 7 (1942)).

Speech is restrained and impaired if the speaker is subject to Congressional inquiry, to compulsory public disclosure of, and to stigmatization because of his religious, political, economic or social opinions.

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* See, e. g., Gellhorn, "Report on a Report of the House Committee on Un-American Activities," 60 *Harvard Law Rev.* 1193 (1947).

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Although the Resolution on its face, and as construed and applied herein, abridges speech, press and assembly, it is not claimed that the expression which is the subject matter of the Resolution nor the expression or activities of the petitioner Eisler, creates a clear and present danger to any substantive public interest. Cf. *Schenck* v. *United States*, 249 U. S. 47 (1919); *Bridges* v. *California*, 314 U. S. 252 (1941); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943).

It is immaterial that the Resolution does not *in haec verba* provide for "direct and candid efforts to stop speaking or publication as such." *Thomas* v. *Collins*, 323 U. S. 516, 547 (1945). "The House Committee's enabling Act concerns, specifically and exclusively, 'propaganda activities', and the Committee's principal purpose is to restrain them" (EDGERTON, *J.*, *Barsky* v. *U. S.*, 167 F. 2d at 255). The decisions of this Court make no exception for abridgements by investigation.* It is the right impaired and not the limitation which requires that test to be applied. *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945).

The revenue power (*Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Grosjean* v. *American Press Company*, 296 U. S. 233 (1936)), the police power (*Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), the judicial injunctive and contempt power (*Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293 (1943); *Bridges* v. *California*, 314 U. S. 252 (1941)), the denaturalization power (*Schneiderman* v. *United States*, 320 U. S. 118 (1943); *Baumgartner* v. *United States*, 322 U. S. 665

* "To the general observation that an agency having authority to make an investigation may compel disclosure of all information relevant to the investigation, irrespective of the scope of the agency's regulatory power, an exception must be noted to the effect that when the purpose of compelling a disclosure is not to secure information for governmental purposes but is to use the power of compelling the disclosure as a sanction for producing a desired regulatory effect, the agency's action is necessarily limited by the scope of its regulatory power. If the agency may not regulate, it may not regulate by using publicity as a sanction." Davis, "The Administrative Power of Investigation," 56 *Yale Law J.* 1111, 1136 (1947).

(1944)), the deportation power (*Bridges* v. *Wixon*, 326 U. S. 135 (1945)), and even the power to preserve the safety of the Government (*Hartzel* v. *United States*, 322 U. S. 680 (1944); *Stromberg* v. *California*, 283 U. S. 359 (1931); *DeJonge* v. *Oregon*, 299 U. S. 353 (1937); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *Taylor* v. *Mississippi*, 319 U. S. 583 (1943)), are all limited by the constitutional rule restraining abridgement of any speech, press or assembly. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639 (1943). The exception carved out by the United States Court of Appeals for the District of Columbia for the investigatory power creates "a blank spot in the protective covering"* of the Bill of Rights, which may be used—or rather is in fact being used—to destroy the very rights it guarantees. As Mr. Justice STONE pointed out, wisely has the "First Amendment prohibit(ed) all laws abridging freedom of press and religion, not merely some laws or all except tax laws." *Jones* v. *Opelika*, 316 U. S. 584, 609 (dissent, adopted as majority view in 319 U. S. 103).

The exception cannot be justified on the grounds that the abridgement of constitutional rights is a tangential incident of Congressional investigation. For the regulation of freedoms guaranteed by the First Amendment is the objective, not a by-product, of the Resolution. The Resolution was re-enacted without change annually after 1938 over objections to and criticisms of the House Committee practices by members of the House. (83 Cong. Rec. 7567-7686 (1938); 84 Cong. Rec. 1098-1128 (1939); 86 Cong. Rec. 572-605 (1940); 87 Cong. Rec. 886-900 (1941); 88 Cong. Rec. 2282-2297 (1942); 89 Cong. Rec. 721-729, 795-810 (1943); 91 Cong. Rec. 10-14 (1945); 92 Cong. Rec. 7720-7728 (1946); 94 Cong. Rec. 2483-2496 (1948)), so that the Committee practices have been incorporated into the Reso-

* *Josephson* v. *United States*, 165 F. (2) 82, 93 (C. C. A. 2, 1947), *cert. den.* 333 U. S. 838 (1948), CLARK, *J.*, dissenting.

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lution. *Poe* v. *Seaborn*, 282 U. S. 101 (1930); *Helvering* v. *Reynolds Tobacco Co.*, 306 U. S. 110 (1939); *United States* v. *Cerecedo Hermanos y Co.*, 209 U. S. 337 (1908); *National Lead Co.* v. *United States*, 252 U. S. 140 (1920); *Boehm* v. *Commissioner of Internal Revenue*, 326 U. S. 287 (1945); *Douglas* v. *Commissioner of Internal Revenue*, 322 U. S. 275 (1944); *Merchants National Bank* v. *Commissioner of Internal Revenue*, 320 U. S. 256 (1943). We need not here consider the situation where a Congressional committee incidentally inquires into matters of opinion and expression in the course of an investigation preparatory for legislation, since the history of the House Committee, which has been infused into the Resolution, reveals that the House Committee is investigating "propaganda activities" not as a preface to legislation but for the purpose of fixing and enforcing standards of political, economic and social orthodoxy in violation of the First Amendment. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943); *Thomas* v. *Collins*, 323 U. S. 516, 544, 545 (1945). In fact, the Committee need not legislate—it has imposed, and is in the process of imposing its own standards of orthodoxy not by legislation—which, as indicated previously, the Committee fears might be struck down as unconstitutional, but by exposure, censorship, defamation and "smear."

Even the objective of the House Committee investigation as construed by the United States Court of Appeals for the District of Columbia is not constitutionally sufficient to counter-balance "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945). The impairment by the House Committee investigation of speech, press and assembly is a greater jeopardy to the security and stability of the nation than the views and expressions investigated. *Stromberg* v. *California*, 283 U. S. 359, 369 (1931); *Near* v. *Minnesota*, 283 U. S. 697, 721 (1931); *DeJonge* v. *Oregon*, 299 U. S. 353,

365 (1937); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 636 (1943). Any actual, attempted or potential threat to the national security is already the subject matter of adequate police investigation and criminal sanctions. 18 U. S. C. §§ 1-17, 21-39, 51-61, 71-151; 50 U. S. C. § 31.

The position of the Circuit Court in the *Barsky* case that the particular inquiry there discussed was authorized cannot be sustained. The Resolution is so vague and indefinite that it authorizes the abridgement of opinion, speech, press and assembly of petitioner and others which are indisputably constitutionally inviolate. A statute which is so vague and indefinite that it extends to speech which may not be impaired as well as speech which may be impaired is a prior restraint on all speech in violation of the First Amendment. *Winters* v. *New York*, 330 U. S. 507 (1948); *Thomas* v. *Collins*, 323 U. S. 516 (1945); *Musser* v. *Utah*, 333 U. S. 95 (1948); *Martin* v. *Struthers*, 319 U. S. 141 (1943); *Jamison* v. *Texas*, 318 U. S. 413 (1943); *Bridges* v. *California*, 314 U. S. 252 (1941); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Carlson* v. *California*, 310 U. S. 106 (1940); *Schneider* v. *Irvington*, 308 U. S. 147 (1939); *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *DeJonge* v. *Oregon*, 299 U. S. 353 (1937); *Stromberg* v. *California*, 283 U. S. 359 (1931). As previously indicated, it is not in this Court's duties or powers judicially to legislate a proper Resolution.

The majority opinion of the United States Court of Appeals for the District of Columbia in the *Barsky* case suggests that the abusive applications of the Resolution by the House Committee may judicially be disregarded as superfluities, restraint of which should be exercised by the Congress. But the abuses and abridgements by the Committee have been integrated by re-enactment into the Resolution and it is a proper function of this Court to provide

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relief therefrom. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 n. 4 (1938); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 638 (1943). It has been stated on the floor of the Congress that "• • • a large number of us are afraid to vote against the Dies Committee. Afraid to vote our honest conviction because we are afraid of the misconceptions and false impressions which that committee, through abundant publicity, has built up in the American public." 89 Cong. Rec. 803 (1943) (Rep. Gale); see also Note, 14 *U. of Chic. Law Rev.* 256, 266 (1947).

As is more fully pointed out in the main brief in this case (pp. 19-35) the Committee has become the well-nigh all powerful censor of the First Amendment. The vague and almost unlimited powers of inquiry it was given inevitably resulted in its assuming the censorship power. In the field of economic thought and ideas, political opinion, in the field of motion pictures and radio, in foreign affairs, in union affairs, in religion, in science, the Committee has acted with devastating force upon the rights guaranteed by the First Amendment. Truly, "the case is as if the enabling Act read 'the Committee shall expose unorthodox propaganda in order to restrain and punish it' ". Edgerton, *J.*, *Barsky* v. *U. S.*, 167 F. 2d at 259, 260.

The evil has thus grown. The very existence on the books of such a vague and indefinite statute as the statute setting up the House Committee on un-American Activities is certainly today a deterrent on the free practice of the rights granted to citizens under the Constitution. It has been pointed out that the every threat of such a statute being on the books makes it invalid under the First Amendment to our Federal Constitution:

> "The fact that bona fide attempts to comply with an indefinite statute might result in curtailment of socially desirable activities seems sometimes to have influenced the Court to enhance the preciseness of notice required. A statute prohibiting the charging

> of 'excessive prices,' for example, may cause the curtailment of desirable business activity because businessmen are not sure just what prices will be held to be within the ban. In the case of a statute which might be interpreted to apply to a civil liberty, *not only is the desirability of civil liberties made clear by the Constitution, but the deterrent effects of such a statute may well impair the very processes by which the law may be altered.* Therefore, if the statute might apply to any hypothetical exercise of the rights of free speech, press, or religion, the Court has indicated that the statute is unconstitutional *even as to an activity which is clearly within its terms and is not constitutionally protected.*" (Note 62 Harvard Law Review 86 (1948).) (Italics added.)

The Resolution is not specific, and for this and all the other reasons set forth heretofore it should therefore also be held unconstitutional under the First Amendment to our Constitution.

C

The Resolution violates the Ninth and Tenth Amendments to the Federal Constitution.

A basic constitutional right is the "exemption of (one's) private affairs, books, and papers from the inspection and scrutiny of others." *In re Pacific Railway Commission,* 32 Fed. 241, 250 (N. D. Cal., 1887) (FIELD, *J.*); *Kilbourn* v. *Thompson,* 103 U. S. 168 (1881); *Jones* v. *Securities & Exchange Commission,* 298 U. S. 1 (1936). The Congressional powers of investigation has, accordingly, been circumscribed by the limits first prescribed in *Kilbourn* v. *Thompson,* 103 U. S. 168 (1881). Like other implied powers, the Congressional power of investigation "is a means to an end and not the end itself"; it "rests simply upon the implication that the right has been given to do that which is essential to the execution of some other and substantive

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authority expressly conferred." *Marshall* v. *Gordon*, 243 U. S. 521, 541 (1917); see also *Sinclair* v. *United States*, 279 U. S. 263, 291 (1929); *McGrain* v. *Daugherty*, 273 U. S. 135, 173 (1927); *In re Chapman*, 166 U. S. 661, 667 (1897); *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597, 613 (1929); *Reed* v. *County Commissioners of Delaware County*, 277 U. S. 376, 388 (1928).

The constitutional functions of the Congress which may be assisted by investigation include: control by the Congress of its members (Art. I, § 5, Cl. 1, 2); impeachment (Art. I, § 3, Cl. 6); the power to make appropriations required for the administration of the laws (Art. I, § 7, Cl. 1); and the formulation of legislation (Art. I, § 8). Investigations into elections or corruption of legislators. (*In re Chapman*, 166 U. S. 661 (1897); *Reed* v. *County Commissioners of Delaware County*, 277 U. S. 376 (1928); *Barry* v. *United States*, 279 U. S. 597 (1929)) and into the affairs of public officials or departments to determine whether the laws are properly administered (*McGrain* v. *Daugherty*, 273 U. S. 135 (1927); *Sinclair* v. *United States*, 279 U. S. 263 (1929)) were not, in scope and in purpose, investigations into the private affairs of private persons although inquiry into those private affairs may have been incidental thereto. But where the objective of an investigation is future general legislation, then the scope of the investigation may be defined in terms of the private affairs of private citizens.

The case of *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881), is the only instance where this Court considered an investigation which has for its defined scope the private affairs of private citizens. It was there held that if the investigation is such "that it could result in no valid legislation on the subject to which the inquiry referred," the investigation would be declared "void for want of jurisdiction in that body." *Kilbourn* v. *Thompson*, 103 U. S. 168, 193, 196 (1881). Such a void investigation was held to be without the constitutional grant of power to Congress contained

in Article I, Section 1 or Article I, Section 8, Clause 18 and therefore in derogation of the powers reserved to the People and to the States by the Ninth and Tenth Amendments.

Kilbourn v. *Thompson* has never been overruled by this Court.

The scope of the investigation authorized by the Resolution is an unlimited inquiry into the private affairs of private persons and the Resolution is therefore unconstitutional because it does not relate directly to prospective valid legislation. It is not sufficient that the investigation may result in some valid legislation which is wholly incommensurate with its scope. *Eberling, Congressional Investigations* 383 (1928). The investigation considered in *Kilbourn* v. *Thompson*, as any investigation, contained some possibility of future legislation.* The right of security for the private affairs of private citizens prohibits an extensive Congressional inquiry into those matters on the slight pretext of a mere possibility of future legislation. The only legislation to which the House Committee investigation is plausibly related is legislation affecting political expression and opinion. The remarkable paucity of legislation produced by this Committee and its predecessors** is indicative of what may be expected in the future. For that paucity of legislation is not due to any lack of diligence on the part of the House Committee; the real block is and has been the Bill of Rights. The House Committee has repeatedly stated that the objective of the Committee is not to produce legislation but to accomplish by publicity and "exposure" what it could not constitutionally accomplish by legislation.*** An investigation which, at best, abridges speech in an effort to determine whether and what

* See Landis, "Constitutional Limits on the Congressional Power of Investigation," 40 *Harvard Law Rev.* 153, 216-217 (1926).

** See Notes, 96 *U. of Penn. Law Rev.* 381, 396 (1948); 14 *U. of Chic. Law Rev.* 256, 259 (1947); 47 *Columbia Law Rev.* 416, 427 n. 109 (1947); 94 Cong. Rec. 2495 (1948).

*** See Note, 47 *Columbia Law Rev.* 416, 427 n. 110 (1947).

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speech may be abridged is in violation of the Ninth and Tenth Amendments.

* * * * * *

Petitioners in again urging the unconstitutionality of the Resolution do not thereby urge this Court to weaken but to fortify the Congressional investigatory power. In a democracy, public confidence in the integrity and fairness of an institution of Government is essential if that institution is to be vital and effective. "Friends and supporters of the congressional power may well fear its present exercise here and find the application of a proper restraint a source of strength in the long run, rather than the reverse. For a widespread belief that the Committee is acting in an Un-American way to even an American end will destroy the Committee's usefulness in the eyes of 'a liberty-loving people'." *

For all these reasons, it is respectfully urged by the petitioners herein that this Court declare the statute establishing the House Committee on Un-American Activities unconstitutional, and that the conviction of the petitioner Eisler should be set aside.

Respectfully submitted,

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Robert H. Goldman,
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* *Josephson* v. *United States*, 165 F. (2) 82, 100 (C. C. A. 2, 1947), *cert. den.* 333 U. S. 838 (1948) (Clark, *J.*, dissenting).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 255.

GERHART EISLER, *Petitioner,*

v.

THE UNITED STATES OF AMERICA.

BRIEF AMICUS CURIAE OF THE NATIONAL LAWYERS GUILD.

NATIONAL LAWYERS GUILD,
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STATEMENT.

The National Lawyers Guild is a bar association with a nation-wide membership. Under its charter it is pledged "to protect and foster our democratic institutions and the civil rights and liberties of all the people."

Its particular concern with the constitutional issues here involved appears from the briefs *amicus curiae* already filed by it in this Court in various proceedings upon certiorari to review prior convictions for contempt of the House Committee on Un-American Activities and involving the same issue to which this brief is addressed. *Josephson* v. *U. S.*, October Term 1947, No. 535, 333 U. S. 838, 858;

Barsky et al v. *U. S.*, October Term 1947, No. 766, 334 U. S. 843; *Dennis* v. *U. S.*, October Term 1948, No. 436.

This concern has now become part of a mounting tide of criticism and protest directed at the committee's proceedings by the President of the United States, the Justice Department, leading legal periodicals, responsible editorial opinion and noted commentators here and abroad. See, President Truman, *Washington Evening Star*, August 19, 1949; *Department of Justice Release*, September 29, 1948; Gellhorn, *Report on a Report of the House Committee on Un-American Activities*, 60 Harvard Law, Rev. 1193; Emerson and Helfeld, *Loyalty Among Government Employees*, 58 Yale L. J. 1; Note, *Constitutional Limitations on the Un-American Activities Committee*, 47 Col. Law Rev. 416 (1947); Prof. Zachariah Chafee, Jr., *Washington Post*, December 13, 1948; Editorial, *New York Herald Tribune*, Oct. 22, 1947; Editorial, *Chicago Times*, Oct. 22, 1947; Mrs. Eleanor Roosevelt, *Washington Daily News*, Oct. 29, 1947; Article, *P.M.* Oct. 27, 1947; Editorial "As Others See Us", *Washington Post*, April 29, 1948; "Don Iddons Diary", *Sunday Mail*, Brisbane, Australia, Nov. 2, 1947; House of Bishops of Protestant Episcopal Church of the United States, *New York Herald Tribune*, Nov. 8, 1947, p. 4; Prof. Henry Steele Commager, "Who is Loyal to America", *Harper's Magazine*, Sept. 1947, p. 193; Kahn, *Hollywood on Trial*, N. Y. (1948), foreword by Thomas Mann.

The extent of this Committee's encroachment upon the constitutionally protected areas of speech and assembly is well stated in the dissent by Mr. Justice Edgerton in *Barsky* v. *U. S.*, 167 F. 2d 241:—". . . it is nearer the truth to say that, among the more articulate, it affects in one degree or another all but the very courageous, the very orthodox, and the very secure." We believe that this dissent together with that of Judge Clark in *Josephson* v. *U. S.*, 165 F. 2d 93 take the only possible position consonant with the Bill of Rights upon the invalidity of this Committee's entire authority. Their essential soundness is confirmed by

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the widespread public protest above referred to, against the Committee's operations. As with the historic "civil rights" dissents by Justices Holmes and Brandeis in the 1920's, their public acceptance has thus far preceded their acceptance as judicial doctrine.

Coming here upon unlimited certiorari, this case affords a timely opportunity to give the force of supreme authority to the constitutional doctrine of these dissents and to put an end to widespread and well-grounded public apprehension concerning this Committee and its threat to constitutional liberty.

There is no other constitutional protection against its constant encroachment upon the protected areas of thought, speech and assembly, which, if unchecked, will give the sanction of law to political conformity, and make our Bill of Rights a dead letter. "No higher duty, no more solemn responsibility, rests upon this Court than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—*of whatever race, creed or persuasion*" *Chambers* v. *Florida*, 309 U. S. 227, 241 (1940) (our italics).

This brief will be confined to that issue.

ARGUMENT.

The Statute and Resolution Creating the House Committee on Un-American Activities are Unconstitutional in that They Authorize on Their Face, and in Practice Have Consistently Resulted in, a Limitless Inquiry Into the Areas of Speech, Assembly, and Association Protected by the First Amendment.

The First Amendment guarantees to all persons without regard to race, nationality or persuasion, the right freely to think, speak and assemble in furtherance of their political and religious ideas. In a word, it precludes from the law-

making province of Congress the entire area of human affairs comprehended by religion, speech, peaceable assembly, the press and the right to petition for a redress of grievances. "The First Amendment is a charter for government, not for an institution for learning. Free trade in ideas means free trade in the opportunity to persuade to action, not merely to describe facts . . . Indeed, the whole history of the problem shows it is to the end of preventing action that repression is primarily directed and to preserving the right to urge it that the protections are given". *Thomas* v. *Collins*, 323 U. S. 516, 537 (1945)

This and a whole series of related decisions by this court during and following the 1930's in which the sweep of the First Amendment's protection was proclaimed repeatedly and with unfailing eloquence, *De Jonge* v. *Oregon*, 299 U. S. 253, 365 (1937); *Martin* v. *Struthers*, 319 U. S. 141, 143 (1943); *Board of Education* v. *Barnette*, 319 U. S. 624, 641-642 (1943); *Thornhill* v. *Alabama*, 310 U. S. 88, 95 (1940); *Schneiderman* v. *U. S.*, 320 U. S. 118, 137 (1942), were believed to have put the full force of authority at long last behind the school of First Amendment interpretation defined a decade earlier in the historic dissents by Justices Holmes and Brandeis. *Whitney* v. *California*, 274 U. S. 357, 377 (1927); *Gitlow* v. *New York*, 268 U. S. 652, 673 (1925); *Schaefer* v. *U. S.*, 251 U. S. 466, 495 (1920); *Abrams* v. *U. S.*, 250 U. S. 616, 630 (1919). Mr. Justice Rutledge, writing for three members of the court in *Musser* v. *Utah*, 333 U. S. 95 (Feb. 9, 1948), has now encouraged the hope that, despite certain recent vicissitudes *Friedman* v. *Schwellenbach*, 330 U. S. 848, 331 U. S. 865; *Josephson* v. *U. S.*, 333 U. S. 838, 858; *Barsky* v. *U. S.*, 334 U. S. 843, the belief has not been wholly unfounded.

In our view, it is impossible to reconcile with the mandate of the First Amendment, the statute and resolution creating the House Committee on Un-American Activities, the authority which it purports to confer and, by no means least important, the consistent operation of the Committee there-

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under for the decade or more that it and its predecessors have existed.*

The statute and resolution would authorize the Committee to investigate "un-American propaganda activities" and "subversive and un-American propaganda" that "attacks the principle of the form of government as guaranteed by our Constitution". Now, "propaganda" is "... a plan for publication of a doctrine or system of principles." *Leubuscher* v. *Commissioner* (C. C. A. 2, 1942) 54 F (2d) 998, 1000; cf. Funk and Wagnall's New International Dictionary (1943), p. 1985. It is a word that means precisely the dissemination of ideas. Its connotations fall entirely within the realm of opinion, thought, speech, publication, advocacy, the very things which the First Amendment declares to be immune from all Government restriction, regulation, or encroachment.** Thus, this power of

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* The present Committee is the successor, without change in character or authority, of the Dies and Wood-Rankin Committees of prior Congresses. The identity in function, power and avowed purpose is so complete that the entire succession may be regarded, for all but purely formal purposes, as one continuing Committee. For the prior resolutions, see H. Res. 282, 75th Cong. 3rd Sess.; 83 Cong. Rec. 7568, 7586 (1938); H. Res. 26, 76th Cong., 1st Sess.; 84 Cong. Rec. 1098, 1128 (1939); H. Res. 321, 76th Cong. 3rd Sess.; 86 Cong. Rec. 572, 605 (1940); H. Res. 90, 77th Cong. 1st Sess.; 87 Cong. Rec. 886, 899 (1941); H. Res. 420, 77th Cong. 2nd Sess.; 88 Cong. Rec. 2282, 2297 (1942); H. Res. 65, 78th Cong. 1st Sess.; 89 Cong. Rec. 795, 810 (1943); H. Res. 5, 79th Cong. 1st Sess.; 91 Cong. Rec. 10, 15 (1945).

** The statute and resolution are equally repugnant to the Fifth and Sixth Amendments in that the terms in which they purport to define the Committee's investigative authority are so devoid of legally cognizable meaning that they wholly fail in those standards of clarity and definiteness required by those Amendments to sustain a charge of crime. *U. S.* v. *Cohen Grocery Co.*, 255 U. S. 81, 89, 92 (1921). "Un-American" and "subversive", the crucial statutory words in this connection, are no more than so many opprobrious epithets connoting subjective political judgment concerning the quality of the "propaganda" to be investigated. They do not identify it otherwise. Cf. Note, 47 Col. Law Rev. 416; Emerson and Helfeld, *Loyalty Among Government Employees*, 58 Yale, L. J. 1, 94-95; 81 Cong. Rec. 3286 (1937); 89 Cong. Rec.

inquiry ". . . sweeps within its ambit . . . activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press". *Thornhill* v. *Alabama*, 310 U. S. 88, 97-98.

To us, it is clear that such an inquiry must abridge political thought, speech, and assembly. To execute an authority conferred in such terms the Committee is bound to probe into the ideas and opinions of those whom it singles out for investigation. From the text of the Resolution itself, therefore, its entire "stock in trade" must be said to occupy an area expressly proscribed by the First Amendment.

It is no answer that the Committee's power was purportedly* conferred in aid of the legislative process. The mere possibility that the Committee may eventually produce some constitutional enactment cannot validate nor put beyond the reach of the Bill of Rights this entire grant of power in all its sweep and vagueness. The effect of any such claim would be to permit Congress to violate the Constitution in the very process of legislating under it. It would introduce into our Constitutional system the startling principle that an unconstitutional means may validly be used if only the end *might* be constitutional. Such a doctrine is wholly unfounded. Cf. *Jones* v. *Securities and Exchange*

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806 (1943); 92 Cong. Rec. A 4742 (1946). Thus they provide an open sesame for investigation of whatever political, social and religious ideas and their advocates may meet the disapproval of individual committee members.

* We say "purportedly" because the Committee has itself repeatedly avowed, and its continuous operation has confirmed, that its major end and purpose are not legislation but "exposure" of individuals and groups whose views it deems incompatible with its own undefined conception of Americanism. H. Rep. No. 2742, 79th Cong., 2nd Sess. 16 (1947). See also, H. Rep. No. 2, 76th Cong., 1st Sess., 13 (1939); H. Rep. No. 1, 77th Cong., 1st Sess., 24 (1941). For its claim to judicial authority, see the reference to it by its chief sponsor as the "grand jury" of America. 91 Cong. Rec. 275. For its notable lack of legislative performance, see 47 Col. Law. Rev. 427, note 109.

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Commission, 298 U. S. 1, 25-26 (1935); *Colonial Sugar Refining Co.* v. *Attorney General* (High Court of Australia), 15 C. L. R. 182, 195 (1912), extended on appeal by Privy Council in L. R. (1914) App. Cas. 231, 257 (1914).

Nor can reliance here upon any supposed legislative purpose of this Committee be reconciled with First Amendment decisions by this Court in recent years in which statutes impinging upon constitutionally protected speech and assembly were successively struck down without regard to ingenious speculation upon whether they might somehow lend themselves to a permitted purpose or application. Compare, *Thornhill* v. *Alabama*, 310 U. S. 88, 97-98 (1940); *Carlson* v. *California*, 310 U. S. 106, 111-112 (1940); *Lovell* v. *Griffin*, 303 U. S. 444, 450-451 (1938); *Herndon* v. *Lowry*, 301 U. S. 242, 263-264 (1937).

Compulsory accountability to any Government body for one's political beliefs or the exercise of the right to act in furtherance of them is so abhorrent to the principles of our constitutional system that the mere provision for any such thing is enough, without more, to violate the First Amendment. "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field, every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us". Jackson, J., in *Thomas* v. *Collins*, 323 U. S. 516, 545 (1945)

While Congress has undoubted power to investigate, that power like any other is limited by the Constitution and subject to judicial review. *Kilbourn* v. *Thompson*, 103 U. S. 168, 181 (1881); *U. S.* v. *Lee*, 106 U. S. 196, 220 (1882); *McGrain* v. *Daugherty*, 273 U. S. 135, 176 (1926); *Jurney* v. *MacCracken*, 294 U. S. 125, 148 (1934).

Unlimited power to investigate "propaganda" is, we submit, an unconstitutional burden upon the rights guaranteed by the First Amendment. As between those rights and Congress' power to investigate, the former are para-

mount and must prevail. This Court has repeatedly so decided with reference to other powers of Government. *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936); *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Schneider* v. *Irvington*, 308 U. S. 147 (1939); *A. F. L.* v. *Swing*, 312 U. S. 321 (1941); *Thomas* v. *Collins*, 323 U. S. 516 (1945). The investigative power of Congress can be no exception if the primacy thus accorded the fundamental guarantees of the First Amendment is to continue. Nor are those guarantees limited to the naked right to think and speak. Their protection extends as well to political association and to all the practices normally entailed in translating political ideas into action. Cf. *De Jonge* v. *Oregon*, 299 U. S. 353 (1937); *Thomas* v. *Collins*, 323 U. S. 516, 537 (1945); *Schneiderman* v. *United States*, 320 U. S. 118 (1943); *Baumgartner* v. *United States*, 322 U. S. 665 (1944); *Bridges* v. *Wixon*, 326 U. S. 135 (1945).

The danger inherent in such a power of inquiry gives particular point to the prophetic warning sounded by this Court sixty-seven years ago when, as now, a roving power of investigation by the House of Representatives was asserted as a necessary adjunct of its broad legislative power under the Constitution. The Court then took the occasion to say: "It is all the more necessary that the exercise of the power by this body when acting separately from and independently of all other depositories of power, should be watched with vigilance, and when called in question before any other tribunals having the right to pass upon it, that it should receive the most careful scrutiny". *Kilbourn* v. *Thompson*, 103 U. S. at p. 192. Accord:—Wigmore, *Evidence* (3rd Ed. 1940) Vol. VIII, Sec. 2195, p. 80.

The invalidity of this statute and resolution on their face are confirmed by the actual operation of the Committee over more than a decade. The burdens imposed by it upon constitutionally protected speech and assembly i.e., the punitive publicity ("exposure") and harassment incident to inclusion in the Committee's *ex parte* reports and other pro-

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nouncements and in the public (and private) "hearings" to which may be haled any person or group deemed or suspected by it to be "un-American" or "subversive", will independently sustain the constitutional invalidity of the statute and resolution. Cf. *Thornhill* v. *Alabama*, 310 U. S. at p. 98; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373-374 (1886).

We make brief reference to some of the Committee's activities which, in their aggregate, have the legal effect indicated.

It has denounced as un-American a whole series of political ideas as such—among them—several measures of moderate social reform. H. Rep. 2748 77th Cong. 2d sess., Jan. 2, 1945, pp. 3, 10, 13, 14, 35, 49; H. Rep. 592, June 16, 1947, p. 12; H. Rep. 2233, June 7, 1946, p. 35. Its chief counsel has attempted to influence news broadcasting in a particular direction. H. Rep. 2223, 79th Cong. 2d. sess. June 7, 1946, p. 12; Cf. Cong. Rec. Jan. 29, 1946 p. A740. In this same connection we refer to the dire consequences to the individuals affected by its *ex parte* "exposures" and irresponsible punitive publicity. Cong. Rec. March 28, 1942 p. 3205; Feb. 8, 1943 pp. 704, 705, 707, 708; Feb. 5, 1943 pp. 654, 656; Cf. *U. S.* v. *Lovett*, 328 U. S. 302; Cong. Rec. March 29, 1940, p. 3695; Oct. 26, 1939 p. 815A; to its blacklist of a million persons or more. H. Rep. 7748, 77th Congress, 2nd Sess., to its use of witnesses to attack political ideas which its members disapprove. See testimony of Gerald L. K. Smith, Hearings, 79th Cong. 2d Sess. Jan. 30, 1946, pp. 20, 60.

We point also to the Committee's markedly soft attitude toward those individuals and groups not coming within its particular condemnation. When a professional anti-Semite —one George Detheridge—proclaiming his views at a Committee hearing, refused to answer questions about his organization, no contempt citation was voted. Hearings, 76th Cong. 1st sess. Vol. 5, 1939, p. 3455 ff. Similarly, the Committee has steadfastly refused to "expose" the Ku Klux Klan, the Christian Front and other specified fascist

and anti-Semitic organizations. Cong. Rec. Oct. 24, 1945, pp. 10181-10182. On one occasion the anti-Semitic harangues on the floor of the House by the Committee's ranking minority member reached such proportions that the Speaker was obliged to intervene. Cong. Rec. Oct. 24, 1945, pp. 10187-10189. For further evidence of the same trend, see 92 Cong. Rec. A872, 1444 (Feb. 19, 1946). It is no wonder that the Committee has been warmly praised in certain quarters. Cong. Rec. Feb. 10, 1943, p. 798.

The Committee's hearings, *ex parte* pronunciamentos and other procedures have evoked severe criticism in and out of Congress. "We can say anything we like about people and they have no recourse". Rep. Dempsey, Cong. Rec. Jan. 23, 1940, p. 587. Rep. Voorhis resigned his Committee membership in bitter protest. Cong. Rec. June 24, 1942, p. 2451. Other Congressmen have from time to time expressed themselves to the same effect with equal vigor. Cong. Rec. Feb. 3, 1939, p. 465; Feb. 9, 1939, p. 1108; Jan. 23, 1940, p. 580. Nor has the Committee's assumed scope and manner of operation escaped sharp judicial criticism. *Reeve* v. *Howe*, E. C. Pa. (1940), 32 Fed. Sup. 619 (unlawful search and seizure by Committee agents); *Ex parte Frankfeld* Dist. of Col. (1940), 32 Fed. Supp. 915 (unlawful commencement of criminal prosecution by Committee agents); *U. S.* v. *Blumberg*, Dist. of Col. (1940) Crim. No. 65,800 (unlawful search and seizure by Committee agents); *U. S.* v. *Dolson*, Dist. of Col. (1946), Criminal No. 65801 (unlawful arrests by Committee agents); cf. *U. S.* v. *Lovett*, 328 U. S. 303-313 (1946).

These judicial strictures have had no effect. The Committee's Hearings on the Motion Picture Industry in 1947, its so-called Espionage Hearings this year and the widespread condemnation evoked by them—its hearsay condemnation of the Southern Conference of Human Welfare so incisively analyzed by Professor Gellhorn (60 Harvard Law Rev. 1193)—these more recent episodes are typical of a longstanding record of which we have cited many other instances.

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Such a record may not be dismissed as so many "excesses" or "aberrations" and thus subtracted from the Committee's total significance. It is rather an integral part of any real Constitutional analysis of its powers because it demonstrates what such a grant of power to any organ of government must become . . . a continuing encroachment upon political thought, speech and assembly, a forced imposition of prescribed orthodoxy upon dissidence, a vehicle for compelling conformity by all to the political views of particular officials on pain of "exposure" and all its consequences. Cf. *Thornhill* v. *Alabama*, 310 U. S. at p. 98; *Yick Wo* v. *Hopkins*, 118 U. S. at pp. 373-374.

CONCLUSION.

Chief Justice Hughes in a distinguished paper has epitomized the constitutional principle here at stake: "Our institutions were not devised to bring about uniformity of opinion; if they had been we might well abandon hope. It is important to remember, as has been said, that the essential characteristic of true liberty is, that under its shelter many different types of life and character and opinion and belief can develop unmolested and unobstructed". (Charles Evans Hughes, Report of the American Bar Association, 1925, pp. 186-187.)

This Committee is a continuous violation of that principle. We ask this Court to declare unconstitutional the statute and resolution creating the Committee and, upon that ground, to reverse this conviction.

Respectfully submitted,

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Public Law 601 upon its face is so vague and indefinite as to permit a general roving inquisition into the affairs, beliefs, opinions, and associations of private citizens by the House Committee on Un-American Activities; and, all the acts, conduct and investigations carried on by said Committee in pursuance thereof establish conclusively that said law purports to authorize such a general roving inquisition contrary to the First, Fourth, Fifth, Ninth and Tenth Amendments to the Federal Constitution 3

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IN THE

Supreme Court of the United States

October Term, 1948
No. 255.

GERHART EISLER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Brief of Herbert Biberman, Alvah Bessie, Lester Cole, Edward Dmytryk, Ring Lardner, Jr., John Howard Lawson, Albert Maltz, Samuel Ornitz, Adrian Scott and Dalton Trumbo as Amicus Curiae.

Statement.

These *amici* are ten motion picture writers, directors and producers, themselves charged with contempt of the House Committee on Un-American Activities arising out of the alleged refusal during the course of the Hollywood Motion Picture Inquiry in October, 1947, to answer questions concerning their trade union and political affiliations. Two of these ten, John Howard Lawson and Dalton Trumbo, have been convicted; their cases are pending on appeal before the United States Court of Appeals

for the District of Columbia. The remaining cases are being held in abeyance in the trial court pending determination of the Lawson and Trumbo cases on appeal.

Before the Committee hearings on Hollywood began, they were functioning artists working in their chosen medium; when the Committee hearings ended, they were blacklisted, broken men, driven from their life's work by this same Committee, all because they dared assert the existence of constitutional guarantees as against the Committee's claim of a limitless power of inquiry.

And equally tragically, those whose jobs in the film world have not yet been directly affected by the conduct of this Committee, carry on their work in fear and uncertainty. The end result of the Committee's Hollywood hearing is this—the motion picture screen is weak and anemic, reflecting only those "pure" ideas, which the Committee considers "safe." Those who challenged the Committee's power were visited by economic death; those who dream of some day challenging that power fear for their economic lives.

Therefore the interest of *amici* in this case; for although the cases of those signing this brief and the instant case are different in many respects, each raising points not involved in the others, there are a number of fundamental questions common to all.

The consent for this filing has been obtained from the parties to this case.

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SUMMARY OF ARGUMENT.

Public Law 601 Upon Its Face Is So Vague and Indefinite as to Permit a General Roving Inquisition Into the Affairs, Beliefs, Opinions, and Associations of Private Citizens by the House Committee on Un-American Activities; and, All the Acts, Conduct and Investigations Carried on by Said Committee in Pursuance Thereof Establish Conclusively That Said Law Purports to Authorize Such a General Roving Inquisition Contrary to the First, Fourth, Fifth, Ninth and Tenth Amendments to the Federal Constitution.

The Committee has consistently utilized its powers to impose political censorship upon opinion and expression. No legislative committee may use the coercive powers ordinarily granted to it to pursue such non-legislative purposes. Ours is a government of delegated powers, with the people reserving and exercising the powers of the sovereign under the Ninth and Tenth Amendments. The primary function of the people with relation to government is that of expressing their political views, which includes, of necessity, their associating together for political activity, with a full opportunity to hear and to debate the positions of others, so that the people, as rulers, may decide justly.

What the Committee has done consistently and designedly is not only to step out of the area of power delegated to it, but to step into the domain reserved to the people. If this is allowed to continue, the principle of popular self-government will be no more; government by the people, for the people, of the people, will become only an historical phrase.

And even more tragically, the continued judicial support given to this Committee, through the infliction (and the appellate upholding) of punishment for contempt of citizens haled before it who challenge the limitless power does violence to our basic democratic traditions. It should be halted.

I.

The Committee Has Consistently Utilized Its Power to Impose Political Censorship Upon Opinion and Expression.

Never before in the history of this republic, have any groups of men claimed and exercised the power to invade the sanctuary of every citizen's mind and, by "exposure," villification and economic reprisals, to destroy those ideas (as well as those men holding them), which do not conform to their test of Americanism. This Committee has functioned in no petty manner. No dictator has ever asserted greater right to control the minds of his subjects.

During its entire existence the Committee has considered its authority under Public Law 601 and preceding resolutions, identical in language, to be sufficiently broad in scope to permit investigation and examination of every kind of organization, whether fraternal, social, political, economic, or otherwise, and of every kind of propaganda including unrestricted inquiry into any and all ideas, opinions and beliefs held or promulgated and the associations of any and all individuals. (House Report 4, 1938, p. 2996.)[1] Hearings Gerald L. K. Smith, 1946, p. 23; Hearings on Communists, 1945, p. 31.

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[1]Except where otherwise indicated all references to Reports are to reports or hearings of the House Committee on Un-American Activities.

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Although the Committee has never been able to agree upon a specific definition of the terms, "un-American propaganda that . . . attack the principle of the form of government as guaranteed by our Constitution," it has conducted its hearings, drawn its findings and conclusions, determined the pertinency of questions and inquiry, summoned witnesses and conducted investigations, upon the assumption and basis that the said terms included the following ideas and beliefs:

1. Political opinions generally considered "new deal" because championed by the late President Roosevelt. On one occasion Chairman Thomas, speaking authoritatively for, and on behalf of, the entire Committee, said that the propaganda being disseminated by agencies of our national Government is "just as un-American as the propaganda that is being spread by those so-called un-American groups." (83 Cong. Rec. 7, p. 7578; Report No. 592, 80th Congress, 1st Session, June 16, 1947, p. 4.)

2. The opinion that the Committee on Un-American Activities is undesirable. (Report No. 592, 80th Congress, 1st Session, June 16, 1947, p. 4; Report No. 592, June 16, 1947, p. 5; Report No. 2233, 79th Congress, 2nd Session, June 7, 1946; Report No. 2233, 79th Congress, 2nd Session, June 7, 1946, p. 31; Report on Citations by Official Federal Government or State or Municipal Agencies or Private Reliable Organizations Regarding the Character of Organizations Named, May 29, 1946, p. 2; Hearings on Gerald L. K. Smith, January 30, 1946, p. 2; House Report No. 1311, 78th Congress, 2nd Session, March 29, 1944, pp. 44, 45.)

3. The opinion that incumbent members of Congress should be defeated and others elected in their place.

(H.-17, p. 10226.) The Committee in one of its reports states that "the essence of totalitarianism is the destruction of the parliamentary or legislative branch of government" and that through "criticizing individual members of Congress" there exists a "widespread movement to discredit the legislative branch of our government." (Report No. 2277, 77th Congress, 2nd Session, June 25, 1942.) Time Magazine was declared to have been engaged in un-American activities because it "gives a two-page spread to the attack made upon Congress by the Union for Democratic Action." (Rep. No. 2277, 77th Congress, 2nd Session, June 25, 1942, p. 4; Rep. No. 2277, 77th Congress, 2nd Session, June 25, 1942, p. 3; Rep. No. 2277, 77th Congress, 2nd Session, June 25, 1942, p. 2.)

4. The following ideas and beliefs concerning economics:

(a) To be in favor of a planned economy;

(b) To oppose monopoly;

(c) To attack "the Standard Oil Company of New Jersey and other responsible industrial organizations";

(d) To "viciously attack cartels";

(e) To say that landlords have highpowered lawyers while tenants do not;

(f) To attack private ownership;

(g) To believe in the abolition of inheritance;

(h) Skepticism as to advertising;

(i) To defend sit-down strikes.

(Rep. No. 1311, March 29, 1944; January 3, 1939, Report, p. 12; Report No. 592, June 16, 1947, p. 9; Report No. 2233, June 7, 1946, p.

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35; Report No. 2233, June 7, 1946, p. 35; Report No. 2233, June 7, 1946, p. 11; Hearings on O. P. A., p. 80; Report No. 2277, June 25, 1942, p. 7; January 3, 1939, Report, p. 12; Report on Communist activity in consumer organizations, incorporated in Committee records, December 3, 1939, released to press December 11, 1939. Rep. No. 1311, 78th Congress, 2nd Session, March 29, 1944. Report on P. A. C., p. 82.)

5. The following political opinions:
   (a) Opposition to the present system of checks and balances in the Constitution;
   (b) Opposition to the method of choosing members of the legislature in New Jersey;
   (c) Advocacy of the formation of a national farmer labor party;
   (d) Advocacy of the Geyer anti-poll tax bill.

   (January 3, 1939, Report, p. 10; January 3, 1939, Report, pp. 38, 39; from testimony set forth in full in the Report because of the Committee's belief in its importance (b) above); January 3, 1939, Report, p. 30; Report No. 592, June 16, 1947, p. 4.)

6. The following opinions on foreign policy:
   (a) Advocacy of withdrawal of American troops from China;
   (b) Belief in the desirability of the dissolution of the British Empire;
   (c) Calling for civilian use of atomic energy and criticizing military use thereof;

(d) Advocacy of the plan advanced by former Secretary of the Treasury Henry Morgenthau, Jr., with respect to our policy in Germany;

(e) The belief that the cause of the Spanish Loyalist Government was just and that the government of Franco Spain is not democratic.

(Report No. 271, 80th Congress, 1st Sess., April 17, 1947, p. 8; Report No. 2233, June 7, 1946, p. 10; Report No. 1996, 79th Congress, 2nd Sess., May 10, 1946, p. 3; Report No. 1996, May 10, 1946, p. 5; Report No. 592, June 16, 1947, p. 10.)

7. Opposition to universal military training. (Report on American Youth for Democracy, No. 271, April 17, 1947, pp. 7, 8.)

8. The following ideas and beliefs with respect to our society:

(a) Absolute racial and social equality;

(b) Opposition to a belief in the divine origin of the rights of man;

(c) Unity regardless of race, creed, and color for a common goal of peace and prosperity.

(Report, January 3, 1939, Un-American, p. 10; January 3, 1939, Report, pp. 10, 11.)

9. Ideas and beliefs favorable to the defense of civil liberties:

(a) Acting as counsel for the Communist Party in civil liberty cases;

(b) Protesting the denial of a meeting place for a speech by Henry A. Wallace;

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(c) Protesting the denial of the right of Paul Robeson to speak in Albany and Peoria;

(d) Signing an open letter for Harry Bridges;

(e) Supporting the Scottsboro, and Sacco and Vanzetti cases;

(f) Joining in a resolution signed by such persons as President Woolley of Mount Holyoke, Professor Chafee of Harvard, Professor Fairchild of New York University, Bishop McConnell of the Methodist Church, and Dean Fleming James of the Divinity School of the University of the South, which opposed outlawing the Communist Party.

(Report No. 1311, March 29, 1944, p. 168; Report No. 592, June 16, 1947, p. 5; Report No. 1311, March 29, 1944, p. 143; release of subcommittee of the Un-American Activities Committee dated December 11, 1939, p. 6, incorporated into the Committee's records on December 3, 1949; Rep. No. 592, 80th Congress, 1st Session, Report on Southern Conference for Human Welfare, June 16, 1947, p. 5; Report No. 1115, p. 11; Report No. 1115, p. 9; Report No. 1311, March 29, 1944, pp. 73 ff.; January 3, 1939, Report, pp. 132, 133; Report No. 592, June 16, 1947, p. 4; May 29, 1946, Report, p. 20.)

The promulgation of any and all ideas whatsoever by books or by newspapers or by radio is considered by the Committee to be an activity falling within the scope of its lawful power; it has condemned books and newspapers with which it disagreed, and it has threatened (and de-

stroyed) radio commentators who expressed *verboten* ideas. (Report No. 1311, p. 141; Report No. 592, June 6, 1947, p. 12; Report No. 592, June 16, 1947, p. 5; Report No. 1115, Civil Rights Congress, p. 11, Nov. 17, 1947; Report No. 1115, p. 13, Nov. 17, 1947; Report No. 2277, June 25, 1942, p. 2; Cong. Rec. March 16, 1944, p. 2688; Report of June 7, 1946, "Review of Communist Developments," "Radio Broadcasts"; Report No. 2233, June 7, 1946, pp. 9, 10; Report No. 2233, June 7, 1946, p. 12.)

Out of 207 names sent by the Committee to the Department of Justice as subversive, 7 were included solely because their names were carried in the files of the "Washington Committee for Aid to China," 42 solely because they were listed as members of the "Washington Book Shop," 33 solely because they were at one time members of the "League for Peace and Democracy," and 73 for the sole reason that their names were on a list of the "Washington Committee for Democratic Action." (Cong. Rec. 77th Congress, 2nd Session, February 24, 1942, Appendix p. 724, ff.)

The most recent extension of the Committee's idea of what is "un-American, subversive and Communistic" is that it includes the assertion of the protection guaranteed by the Fifth Amendment to the Constitution of the United States:

> "Among these is the new Communist tactic of evading detection and impeding the processes of legislative investigation through an unwarranted and unjustifi-

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able misuse of the protections which the fifth amendment to the Constitution rightfully provides for those unjustly accused or those decent, patriotic Americans who may at times find themselves required to defend themselves in a court of law."—*Interim Report on Hearings regarding Communist Espionage in the United States,* August 28, 1948, p. 15.

All those who have not fully conformed to the Committee's concept of Americanism have been labeled Communists. The Committee has acted upon the assumption that its reason for existence is to destroy all "Communist" influences in America. Thus, during the course of the hearing on "Communist Infiltration into the Motion Picture Industry" conducted in Washington in October, 1947, by the Committee, a member of the Committee urged the Motion Picture Producers Association "to concern itself with cleaning house in its own industry. . . . I don't think you can improve the industry to any greater degree and in any better direction than through the elimination of the writers and the actors to whom definite Communistic leanings can be traced." The Committee's counsel joined in the demand that "Communistic influences . . . and I say Communist influences; I am not saying Communists," be eliminated from the industry by cutting "these people off the payroll." (Hearings Regarding the Communist Infiltration of the Motion Picture Industry, 194, pp. 49-50.)

The number of American people whose right to speak and think has thus been challenged is so large that it can

truly be said that no American, except perhaps the consistently most reactionary, can be sure that what he said yesterday or will say tomorrow will not place him on the Committee's "subversive" list. The Committee has since its inception maintained records and files which now contain over a million names of persons and one thousand names of associations deemed by the Committee to be un-American, subversive or Communistic; these records are growing; the files are made available to Federal and State and other government agencies; names for the records are obtained from various sources, including persons designated as subversive by individuals whom the Committee deemed reliable.

Nor have the Committee's activities been limited to attacks upon individuals because of their ideas. The Committee has assumed for itself the direct authority to censor. Thus, the Committee called upon the motion picture industry to eliminate from pictures anything which the Committee considered Communistic or un-American or subversive propaganda. The Committee chairman and other Congressmen, members of the Committee, recognizing that "it would be very foolish for a Communist or a Communist sympathizer to attempt to write a script advocating the overthrow of the government by force or violence," found un-American propaganda in "innuendoes and double meanings, and things like that" in "slanted lines" in "subversion" inserted in the motion pictures "by a look, by an inflection, by a change in the voice." Among the subversive manifestations in motion pictures specified by the

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Committee were reference to some "crooked" members of Congress, to dishonest bankers or senators, to a minister shown as the tool of his richest parishioner, and to presentation of bankers as unsympathetic men. (Hollywood hearings, 44, pp. 15, 17, 50-52, 61, 94, 95, 114, 122-6, 225, 231-2, 234.)

These are not sporadic manifestations of this Committee activity. They are the substance and the sum (as well the end purpose) of this Committee's activity under its construction of the vague language of the Public Law 601.

So drastic an investigational power cannot lightly be presumed to have been lodged in this House Committee by H. R. 5, nor should it be read by implication into that resolution, for to do so raises grave constitutional questions. Despite the willingness of courts to construe liberally the sweep of the Congressional investigatorial power, they have not yet approved so dangerous an extension of that legislative prerogative.

It is no exaggeration to say that judicial support of such power threatens the fabric of our democratic society. And thus far, tragically, this Court has not spoken out definitely with respect to the constitutional bound of this Committee's power. It should do so now.

II.

The Fact That the Committee Has Construed and Exercised the Authority Conferred Upon It as Extending Into What Are Clearly Political and Non-legislative Areas Require a Reversal of the Conviction Herein.

The presumption of regularity of a Congressional investigation is not conclusive; a defendant may show that the Committee has exceeded its powers. Whether it has in fact done so is a judicial question; if the court finds that it has, the court must so declare, and the defendant must be acquitted. This judicial task may be delicate and difficult; but neither delicacy nor difficulty should become effective barriers to the proper exercise of the judicial function.

The nature of the judicial task in determining whether a legislative committee has acted in excess of its power is discussed in *People v. Webb*, 5 N. Y. Supp. 855, 23 N. Y. St. R. 324:

> "Assuming therefore, as we must under the authorities that the legislature has no general judicial powers, and that it can confer none upon its committees, and that its power to punish contumacious witnesses is confined strictly to examination for legislative purposes, *we are forced in this case to the consideration of the question,* was the investigation in which the special committee of the House was engaged, when the relator refused to answer and produce papers, for legislative purposes?

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"As we have seen, a legislative committee may summon and examine witnesses in legislative matters; but when they seek to enforce obedience by proceedings for contempt, they must be acting strictly within the limitations of their delegated authority."

In the *Webb* case, the resolution of the investigating committee declared that the investigation was "for the purpose of remedial legislation." To the assertion that this declaration established conclusively the lawlessness of this Committee's purpose, the Court replied (at p. 861):

"* * * But such declaration alone, unsupported by any fact, could not confer jurisdiction. If it could, then, by incorporating such a declaration in a resolution, a legislative committee could invade private rights, and thus inquisitorially proceed to investigate all the transactions of an individual or a community, *under the delusive pretense of remedial legislation* * * *. *The rule is elementary that the mere assertion of jurisdiction does not confer it upon a tribunal of special and limited authority.*" (Emphasis supplied.)

"* * * The courts should and will be quick and firm in halting the exercise of those powers for *irrelevant, illegitimate* or *oppressive* examinations or *purposes.*"—*Hirschfield v. Henley,* 127 N. E. 252.

Burnham v. Morrissey, 14 Gray (Mass. 226), a leading case, held:

"The house of representatives is not the final judge of its own powers and privileges *in cases in which the rights and liberties of the subject are concerned;*

but the legality of its action may be examined and determined by the Court. * * * Especially is it competent and proper for this court to consider whether its proceedings are in conformity with the Constitution and laws, because living under a written constitution no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine, in cases regularly brought before them, whether the power of any branch of government and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void."

See also: *Application of Gilchrist,* 224 N. Y. Supp. 225; *People v. Keeler,* 99 N. Y. 482; *Daugherty's* case, 273 U. S. at 175; *Sinclair v. United States,* 279 U. S. 263; *In re Gunn,* 32 Pac. 470; *State v. Guilbert,* 78 N. E. 931; *Greenfield v. Russell,* 292 Ill. 392; *Stockton v. Leddy,* 55 Colo. 24; and cases collated in American Annotated Cases, 1916-B in the note entitled "General Powers and Privileges of Investigating Committees," at p. 1055. See, also, L. R. A. 1917-F and the cases there collated; *Blakeslee v. Carroll,* 64 Conn. 223, 29 Atl. 473; 25 L. R. A. 106; *In re Oliver,* 92 L. Ed. (Adv. Op. p. 491).

If the principles enunciated in these cases are to be sustained, a judicial determination must be made as to whether the Committee on Un-American Activities has functioned within or outside the limitations imposed upon legislative bodies. It is submitted that the record is clear. This Committee has consistently pursued non-legislative, irrelevant, illigitimate and oppressive purposes. Such usurpation of power should not receive judicial support.

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III.

The Committee's Authority and Exercise Thereof Infringes Upon the Area of Governmental Authority Possessed by a Self-Governing People and Reserved to Them by the Ninth and Tenth Amendments.

Under the Constitution, the federal government exercises certain delegated powers only; the remaining governmental powers are reserved to the states and the people. *Ninth and Tenth Amendments to the Constitution of the United States.*

The people hold a two-fold position. They are the sovereign, the source of all delegated governmental powers; at the same time they, as the sovereign, perform essential and separate governmental functions.

Among the governmental functions reserved to and exercised by the people is participation in the myriad forms of action, including political discussion and association, embraced within the electoral and legislative processes. As the Supreme Court said in *Yick Wo v. Hopkins,* 118 U. S. 356, "Sovereignty remains with the people," as the "ultimate tribunal of public judgment," acting either through "the pressure of opinion or by means of suffrage" and exercising the most fundamental governmental functions, because they are "preservative of all rights." Just as the courts interpret and apply the law in judicial proceedings, so the people exercise their governmental powers of voting, of speech, of petition, and of assembly and association, to bring about such changes in the law and its administration as they deem necessary, wise, or just.

Bridge Co. v. U. S., 105 U. S. 470, 482.

As the sovereign, the people reserved to themselves and to the states the powers not delegated to the federal government; the Ninth and Tenth Amendments were adopted to make explicit what was already implicit. So, too, freedom of speech, press, and association, those indispensable corollaries of the powers reserved to the people were spelled out by the Bill of Rights.

Grosjean v. American Trust Co., 297 U. S. 233;
Powe v. U. S. (C. C. A. 5th), 109 F. 2d 147 (cert. den. 309 U. S. 679).

In *United States v. Cruikshank*, 92 U. S. 542, the court said:

> "The government thus established and defined is to some extent a government of the States in their political capacity. It is, also, for certain purposes, a government of the people. . . . The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is and always has been one of the attributes of citizenship under a free government. . . . It was not, therefore, a right granted to the people by the Constitution. The Government of the United States, when established, found it in existence, with the obligation on the part of the States to afford it protection. . . . The right was not created by the (First) Amendment; neither was its continuance guaranteed, except as against congressional interference . . . the right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or duties of the National Government is an attribute of national citizenship and, as such, under the protection of and guaranteed by, the United States." (See also *U. S. v. Classic*,

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313 U. S. 299, 85 L. Ed. 1368; *Ex Parte Yarbrough*, 110 U. S. 651, 28 L. Ed. 274; *In re Quarles*, 158 U. S. 532, 39 L. Ed. 1080.)

"*In a system of popular government the existence of this liberty* (freedom of speech and of press) *is imperative; because, when people frame their constitutions and laws they necessarily reserve to themselves the power to alter or amend them and to change their representatives and officials and even their government at will.* Where individual citizens *participate in the framing of laws and the selection of officials,* they must necessarily be permitted to express their opinion; in order to formulate opinions, *they must know the facts* and circumstances which justify or fail to justify the enactment or repeal of statutes or constitutional provisions, and the merits and demerits of those who aspire to political office . . . *Government by the people is utterly inconsistent with a press not free* and universal suffrage becomes a farce unless speech is free. The conception of *lese majeste* and of the Divine Right of Kings has long since disappeared and we must not make the mistake of substituting therefor a Divine Right of the Majority." Patterson, "Free Speech and a Free Press," pp. 6-7. (Emphasis added.)

"These judges know that statutes, to be sound and effective, must be preceded by abundant printed and oral controversy. *Discussion is merely legislation in the soft. Hence drastic restrictions on speeches and pamphlets are comparable to rigid constitutional limitations on law making.*" Chaffee, pp. 360-361. (Emphasis added.)

A hundred and fifty years ago in a period of history remarkably similar to the present in its fear of ideas and its justification for their suppression, Madison's Vir-

ginia Resolution opposed the American Sedition Act of 1798 because under it Congress would exercise powers which the people did not delegate to it and which were expressly forbidden by the First Amendment. The resolution stated "that such powers more than any other ought to produce universal alarm because it was leveled against that right of freely examining public characters and measures, and all free communication thereof, which has ever been justly deemed the only effectual guardian of every other right." Patterson, in his "Free Speech and Free Press" (p. 134), calls attention to the fact that Madison was chairman of the committee of Congress that drafted the first ten amendments and the preamble to the statute proposing them, and that, therefore, "his argument assumed more than usual importance." See also Patterson's "Free Speech and Free Press," pp. 6-7, 14, 228; Chaffee, "Free Speech in the United States," p. 234, 350-1, 550-63.

The critical balance between limitless power, which is tyranny, and a constitutional democracy can be maintained by constant popular supervision, and then only if the people can exercise their governmental powers without obstruction or interference by the agencies supervised.

The power of Congress to represent the people cannot be used to invade the power of the people over their own representatives. If any one of the branches, exercising delegated powers oversteps its authority, the power of, and opportunity for, correction remain in the people; but

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if the power of the people as the sovereign is invaded, democracy disappears.

In the case of *O'Donoghue v. United States,* 289 U. S. 516, holding that the legislature could not reduce judicial salaries because such power would provide the means for its control of the judiciary, the court said:

> "If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others—independent not in the sense that they shall not co-operate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the *acts of each shall never be controlled by, or subjected, directly or indirectly, to the coercive influence of either of the other departments.*" (*Humphries Executors v. United States,* 295 U. S. 602.)

The same principles apply where the federal government interferes in matters reserved to the state governments. *Bailey v. Drexel Furniture Co.,* 259 U. S. 20, 66 L. Ed. 817. Similarly, it is established that a state may not invade the area delegated to the federal government. In the case of *United States v. Owlett* (D. C. Pa., 1936), 15 Fed. Supp. 736, the state legislature was enjoined when it began an investigation of the functioning of the federal Works Project Administration. The court held that an attempt in any manner to "impede or obstruct" the federal government in the exercise of a federal power is unconstitutional.

It stated that the attempt of the State Committee "to investigate a purely federal agency is an invasion of the sovereign powers of the United States of America," and that such assertion of power "is in contravention of our dual form of government and in derogation of the powers of the federal province." An Australian case to the same effect is *Colonial Sugar Refining Co. v. Attorney General* (1914), A. T. 237.

Although the doctrine of separation of powers has most generally been enunciated in controversies involving delegated branches of government, the principles underlying it are all pervasive and must be applied wherever governmental power is to be found.

The Constitution protects the governmental powers of citizens, including the right of association in a political party; accordingly the legislature may not prescribe political orthodoxy, and may not condemn any political philosophy, just as the judiciary may not interfere in the exercise by the legislature of the powers conferred upon it. Even an attempt to interfere must be stricken down.

> "It would be an abuse of judicial power for the court to *attempt to interfere with the constitutional discretion of the legislature.*" (*Bridge Co. v. U. S.*, 105 U. S. 470, 482.)

The California 1897 Direct Primary Act permitted political parties to require persons, as a condition of voting at the primary, to give an oath that they would thereafter support the nominees of that party. That statute was

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declared unconstitutional and the Supreme Court, in *Spier v. Baker* (1898), 120 Cal. 370, said at page 379:

> ". . . And the moment you recognize the existence of power in the legislature to create tests in these primary elections, you recognize the right of the legislature to create any test which to that body may seem proper. While the test prescribed in this act may be said to be a most reasonable one, yet the right to make it carries with it the right to make tests most unreasonable. If the power rests in the legislature to create a test, then the power is found in a Democratic legislature to make the test at a primary election a belief in the free coinage of silver at the ratio of sixteen to one, and the same power is found in a Republican legislature to make the test a belief in the protective tariff. If such a power may be sustained under the constitution, then the life and death of political parties are held in the hollow of the hand by a state legislature."

The case of *United States v. Owlett*, 15 Fed. Supp. 736, recognizes the same principle:

> "The investigation (of WPA by a state committee) is an interference with the proper governmental function of the United States of America. The *complete immunity* of a federal agency from state interference is well established." (Emphasis added.)

The immunity of the federal agency there is no greater than the immunity of the private citizen here, for all citizens have complete immunity in the exercise of their gov-

ernmental functions from any interference by any branch of the government exercising delegated powers.

When exercising governmental functions, the people enjoy an immunity which can be compared to that conferred upon legislators, and for similar reasons. Article I, Section 6, clause 1, of the Constitution states with respect to congressmen: ". . . for any speech or debate in either house, they shall not be questioned in any other place." This protection stems from a deep public interest in encouraging congressmen to participate freely and without limitation in their legislative function. The Constitution protects legislators even against their own misconduct, for fear that otherwise they might fail to conduct themselves with courage on proper occasion. *Kilbourne v. Thompson,* 103 U. S. 168.

Just as the congressmen must select for themselves what they will rely upon in statements made by their fellow congressmen, so the people must select for themselves what they will accept in the marketplace of ideas.

> "But it cannot be the duty, because it is not the right of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." (*Thomas v. Collins,* 323 U. S. 516, 545.)

The people's sovereignty, so long jealously guarded by the courts, now hangs in the balance in this case.

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IV.

The Continued Judicial Support of This Committee, Through the Trial Court's Infliction of Punishment for Contempt (and the Repeated Appellate Affirmance Thereof), Does Violence to Our Basic Democratic Traditions.

American democracy is no accident; it is the majestic product of a vigorous, experimental and passionate history. This nation came into existence as the result of a purposeful struggle against governmental tyranny. The heritage of Thomas Jefferson—"Rebellion to Tyrants is obedience to God"—remains with us, embodied in our institutions and traditions. The spirit of Inquisition, which was abjured in the Declaration of Independence, has always been obnoxious to our political and social life. Equally, it has found no tolerance in our legal codes, our legal traditions, our juridical morality. Due process has meant a fair, legal process. Liberty has meant genuine, concrete liberty for the individual citizen—his right to freedom from search and seizure, his right to privacy, his right to be free of persecutory inquisition on grounds of race, color, creed, political opinion or association.

This traditional, tolerant, flexible democracy must not be sapped, calcified or corrupted. A few men, temporarily in the seat of government, have promulgated the validity of inquisitorial procedures into the lives and beliefs of citizens. Armed with their own prejudices, with their own rules of procedure, with the power and dignity of Congress, they tried to become the censors of the nation's thought. That which the sobriety of our law, the majesty of our Constitution, the heart-blood of our tradition, all reject—was practiced with impunity in the stifling atmosphere of a fomented hysteria.

The daily newspapers attest to the resurrection in America of the infamous Star Chambers of England. The House Committee on Un-American Activities sits in judgment upon the conduct and opinions of all citizens, assuming the license to conduct trials by headline, to render verdicts without evidence or cross-examination, to prosecute, vilify and promote the economic blacklist of individuals in its disfavor—and all of this under the guise of an inquiry for the purpose of proposing legislation.

This public infamy is neither capricious nor the accidental by-product of other effort. The conduct of this committee over years reveals a sober, calculated and sinister purpose, namely: to frighten and coerce the citizenry into a new concept of loyalty to the state. The nature of this new, demanded loyalty has been well described:

> "What is the new loyalty? It is, above all, conformity. It is the uncritical and unquestioning acceptance of America as it is—the political institutions, the social relationships, the economic practices." (Prof. Henry Steele Commager, Harper's Magazine, Sept., 1947.)

The bitter price of these inquisitorial activities, if left uncurbed, will be paid by the entire nation. The current victims of this Committee (and of its increasing number of emulators in city, county and state), are only the first, minor casualties of a vaster tragedy to come. The latter has already been envisioned by the Supreme Court:

> "Those who begin coercive elimination of dissent soon find themselves eliminating dissenters. Com-

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pulsory unification of opinion achieves only the unification of the graveyard." (*Board of Education v. Barnette*, 319 U. S. 624, 641-642 (1943).)

The impact of these inquisitorial procedures, and of the atmosphere they engender, is already seriously destructive to the national fabric. Tolerance yields before suspicion, mob violence, censorship. In Philadelphia the police raid book-stores without warrant; in New York hitherto acceptable volumes are suddenly removed from school libraries; in a dozen universities learned men are dismissed for holding "wrong" opinions; radio commentators inimical to the House Committee are dropped from networks. These are but a few examples of the plague spots now visible on the body of the community.

Particularly in the fields of ideas, of scientific investigation, of cultural and literary production, our traditional free exchange and free creation are rapidly giving way to suspicion, fear, silence, withdrawal. This situation is attested to by the leading professionals within those fields.

"Atlantic City, N. J., Mar. 19, 1948.

"Five of America's leading scientific societies, meeting here as constituent members of the Federation of American Societies for Experimental Biology, adopted resolutions at membership meetings today 'deploring the actions and procedures' of the Congressional Committee on un-American Activities as 'inimical to the nation's goods . . . 'The effective use of scientific manpower in Government positions is endangered . . .'" (N. Y. Times, March 20, 1948.)

This calamitous impact in the field of science has its counterpart in literature and the arts:

STATEMENT BY 132 MEMBERS OF THE NATIONAL INSTITUTE OF ARTS AND LETTERS, FEB., 1948.

"To the Speaker of the House of Representatives.

Sir:

We, the undersigned, a group of members of the National Institute of Arts and Letters, an honorary organization of American writers, artists and musicians, protest against the methods employed by the Committee on un-American Activities in its examination of certain writers recently summoned before it. . . . The right of any American to think as he pleases and to say what he thinks is a right of particular importance to us because upon it rests the freedom of the creative artist and, by consequence, the vitality of the creative arts. The methods employed by the Committee on un-American Activities result in an indirect form of censorship. This is proved by the recent action of the motion picture industry in blacklisting the writers who defied the committee. Such censorship, even in the case of those whose political beliefs we vigorously oppose, endangers the very structure of our traditional free art and free literature in the United States." (Author's League Bulletin, March, 1948.)

Sentiments similar to the above have been vigorously expressed by the Authors League of America, by assembled professionals in the arts all over the nation. The concrete result of this intimidation and indirect censorship by the

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House Committee has best been expressed by William Wyler, distinguished motion picture director, winner of the 1946 Academy Award for direction of the film, "The Best Years of Our Lives": "I wouldn't be allowed to make 'The Best Years of Our Lives' in Hollywood today." (Radio broadcast, October 26, 1947.)

Conclusion.

The issue is momentous, of far-reaching implication, and the ruling of the Court will be a categorical imperative whose cumulative effect will be seen only in the fullness of time.

> "Nothing less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and repression for society as a whole. The dangers are not fanciful. We too readily forget them. Recollection may be refreshed as to the happenings after the first World War by the 'Report Upon the Illegal Practices of the United States Department of Justice,' which aroused the public concern of Chief Justice Hughes (then at the bar) and by the little book entitled 'The Deportations Delirium of Nineteen-Twenty' by Louis F. Post, who spoke with the authoritative knowledge of an Assistant Secretary of Labor." (Frankfurter, J., dissenting, *Harris v. U. S.* (1947), 331 U. S. 145, 173.)

At this truly grave moment in our nation's growth it is in the power of this Court to speak forthrightly in the language of Coke, Camden, and Bradley, in the language of the many illustrious jurists for whom the frenzy of the

political market place never blurred the meaning of freedom.

> "Under our constitutional system courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement. * * * No higher duty, nor more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion." (*Chambers v. Florida*, 309 U. S. 227, 241 (1940).)

What is required at this moment of this Court is not innovation, but rather a restatement of the glowing principles by which the history of the western world has given dignity to its citizens:

> "Historical liberties and privileges are not to bend from day to day because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. A community whose judges would be willing to give it whatever law might gratify the impulse of the moment would find in the end that it had paid too high a price." (Cardozo, J., *Matter of Doyle*, 257 N. Y. 268.)

Only thus can there be a reaffirmance of our great democratic tradition perhaps best epitomized by the concept of Jefferson that in order for democracy to survive "The people must be free to form their own opinions and

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to exercise their native reason untrammeled by authority." (Boyd, "Subversive of What?" Atlantic Monthly, August, 1948.)

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1948

No. 255

GERHART EISLER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

MOTION OF AMERICAN COMMITTEE FOR PROTECTION OF FOREIGN BORN FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*, AND BRIEF OF *AMICUS CURIAE*

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Supreme Court of the United States

OCTOBER TERM, 1948

No. 255

GERHART EISLER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

May it Please the Court:

The undersigned, as counsel for American Committee for Protection of Foreign Born, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae.*

LEE EPSTEIN,
Counsel for American Committee
for Protection of Foreign Born,
as *Amicus Curiae.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 255

GERHART EISLER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF AMERICAN COMMITTEE FOR PROTECTION OF FOREIGN BORN, AS *AMICUS CURIAE*

I

Preliminary Statement

This brief is filed on behalf of the American Committee for Protection of Foreign Born, with the written consent of both parties to the pending case. The members of this Committee and associates—organizations of the foreign born, trade unions, church, social welfare, civil liberty and civic organizations throughout the country—recognize the necessity, never greater than at present, of insuring to the foreign born in our midst (citizen and non-citizen) the full protection to which they are entitled under our laws. This necessity is made more urgent, in the instant case, by the fact that the country from which the defendant-petitioner

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comes, and which, under normal conditions might properly intervene through diplomatic channels to protect his rights, is a conquered country still under military occupation. Even the protecting power (Switzerland) which might have intervened in his behalf during the war, has ceased activities since the suspension of hostilities.

The American Committee for Protection of Foreign Born has a particular interest in the instant case because it has been at the forefront of the campaign to secure for the defendant-petitioner the right to leave this country in order to return to Germany.

II

The Facts

The defendant was subpoenaed to appear before the House Un-American Activities Committee. While preparing to appear, he was placed under arrest as an alien enemy (stipulated at p. 89 record, fol. 218) the day before he was to testify. He was taken to the committee hearing under guard and in arrest (see opinion below, *Eisler* v. *U. S.*, 170 Fed. (2d) 273, 276 (1948)).

It is the defendant's contention that, by arresting him as an alien enemy, the Attorney General (regardless of the motive inspiring the arrest) conferred on the defendant immunity from testifying, in accordance with Article V of the Geneva Convention relating to Prisoners of War. This contention was made by a preliminary motion to dismiss the indictment (Record, pp. 218-220, fol. 463) by motion at the trial (Record, p. 153, fol. 351), and by motion in arrest of judgment (Record, p. 228, fol. 473). The point was also raised on the appeal to the Court of Appeals (see *Eisler* v. *United States*, 107 Fed. (2d) 273, 281 (1948)).

This brief *amicus curiae* is devoted solely to the point that the charge against the defendant must fall because of

the immunity against involuntary testimony granted to arrested alien enemies by the Geneva Convention re Prisoners of War.

III

Argument

SUMMARY OF ARGUMENT

Point A. As an arrested alien enemy, the defendant was entitled to the same rights as a Prisoner of War.

Point B. The defendant, as a Prisoner of War, cannot be punished for refusal to testify.

Point C. The immunity granted by the Geneva Convention has not been revoked.

POINT A

As an arrested alien enemy, the defendant was entitled to the same rights as a Prisoner of War.

An alien enemy who is arrested is entitled to at least the same protection as a prisoner of war. Basic Field Manual FM 27-10, "Rules of Land Warfare", issued over the signature of General Marshall, Chief of Staff, by order of the Secretary of War, states (p. 16):

> "Chapter 4. Prisoners of War.
>
> 70. Definition—Except as otherwise hereinafter indicated, every person captured or interned by a belligerent power because of the war is, during the period of such captivity or internment, a prisoner of war, and is entitled to be recognized and treated as such under the laws of war."

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The same point is made in the text book "Law of Land Warfare", prepared at the Judge Advocate General's School conducted by the Army at Ann Arbor, Michigan (p. 47):

> "*Civilian internees.* Civilian aliens found in a belligerent's own territory at the outbreak of war may be interned. Such persons are, under the American and English practices as well as by the weight of authority under international law, treated as prisoners of war. The United States and the enemy governments, namely, Germany, Italy and Japan have agreed through the Swiss Government to treat interned civilian alien enemies, on a reciprocal basis, at least as favorably as prisoners of war."

The undertaking of our government is expressed as follows: "This Government declared that enemy aliens whom it might be found necessary to intern would be treated at least as favorably as prisoners of war." United States Department of State Bulletin, vol. VI, No. 152, pages 445, 446, May 23, 1942.

This was the rule before it was restated in the Department of State Bulletin. Hyde, formerly Solicitor for the Department of State of the United States, in his monumental work "International Law, Chiefly as Interpreted and Applied by the United States", says at page 1862 of volume 3:

> "If recourse is had to internment, the individuals taken into custody, until convicted of offenses against the local law, are believed to be entitled to treatment as favorable as that accorded prisoners of war."

The leading British work states:

> "Every individual who is deprived of his liberty, not for a crime, but for military reasons, has a claim

> to be treated as a prisoner of war • • • The (Geneva) Convention does not contain anything regarding the treatment of *private* enemy individuals, and enemy officials, whom a belligerent thinks is necessary to make prisoners of war; but it is evident that they may claim all the privileges of such prisoners. They are not convicts, but are taken into captivity for military reasons, and are therefore prisoners of war."
>
> "And the same is valid with regard to enemy civilians who at the outbreak of war are on the territory of a belligerent, and, for military reasons, are interned. They are not convicts either, but are deprived of their liberty for military reasons only, and are therefore prisoners of war." 2 Oppenheim, International Law (6th Edition, Lauterpacht) § 127, pp. 299-300.

The Judge Advocate General of the United States Army instructed all parties concerned that interned alien enemies were to be treated as prisoners of war. Opinion SPJGW 1942—4753, October 12, 1942 reported in 1 Bulletin of the Judge Advocate General, page 259, which states:

> "This office has been informed orally by the Department of State that an agreement has been made through the Swiss government with the enemy governments that civilian enemies detained are to be treated as prisoners of war."

See also opinion of the Judge Advocate General to the Provost Marshal General, SPJGW 1943—3029, February 26th, 1943 reported at 2 Bulletin of the Judge Advocate General, page 51, which says in part:

> "Accordingly, to determine the position of a German civilian internee we look, in principle, to the rights and liabilities of a German prisoner of war charged with the same unlawful act."

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This rule is followed by the British opposite number of our Manual for Court-Martial, the Manual of Military Law, which states (appendix 12, p. 15):

> "The following can claim to be treated as prisoners of war:
>
> • • • • • • • •
>
> (c) Private enemy individuals and enemy officials whom a belligerent thinks it necessary to make prisoners. Although the Hague Rules and Prisoner of War Convention do not contain anything regarding the treatment of these individuals, they are not civil prisoners because they are taken into captivity for military reasons and are therefore Prisoners of War."

See also Flory, "Prisoners of War", 24-27, and Robert R. Wilson, "Treatment of Civilian Alien Enemies", 37 American Journal of International Law 30 (1943).

United States War Department Mobilization Regulations, No. 1-11 (1 April 1940) states, at page 3:

> "Every person captured or interned by a belligerent power because of war is, during the captivity or internment, a prisoner of war, and is entitled to be recognized as such under the laws of war."

This is the position taken by the unanimous court in *Rex* v. *Commandant of Knockalow Camp (Ex parte Forman)*, 117 Law Times Reports 627 (1917), and in *King* v. *Supt. of Vine St. Police Station*, 1 KB 268 (1916), where Judge Bailhache said at page 275:

> "I have come to the conclusion that a German subject resident in the United Kingdom, who in the opinion of the Executive Government is a person hostile to the welfare of this country and is on that account interned, may properly be described as a prisoner of war, although not a combatant or spy."

The language may be aptly paraphrased to meet this case: the defendant, who was, at the time of the alleged offense, in the opinion of the Attorney General an alien enemy dangerous to the public peace and safety of the United States, and on that account interned, was properly described as a prisoner of war.

POINT B

The defendant, as a Prisoner of War, cannot be punished for refusal to testify.

The Attorney General has conferred upon the defendant the status of prisoner of war, and thereby made him immune from punishment for refusal to testify before the Committee.

The Geneva Convention on Prisoners of War (ratified by the United States in 47 Stat. 2021, January 16, 1932) states, at Article 5:

> "Every prisoner of war is bound to give, if he is questioned on the subject, his true name and rank, or else his regimental number * * * Prisoners who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind whatever."

Law of Land Warfare (op. cit.) states, at page 58:

> "A prisoner of war is bound to give, if questioned, his true name and rank *or* his serial number. The only punishment for refusal to supply such information or giving false information that may be imposed is the loss of privileges accorded to prisoners of his class. A prisoner may not be deprived of other privileges because he refuses to give *other* information. He may be questioned on any subject but he need not answer nor may he be coerced into giving such information." (Emphasis in original.)

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This is in accord with Spaight, "Air Power and War Rights", 340:

> "Loss of privileges is the only punishment which a refusal to state name or number entails upon a prisoner, and he may not be deprived of any privileges because he refuses to give other information. He may, however, be questioned on any and every subject, but he is not bound to reply."

Oppenheim (op. cit.) says (§ 126a, p. 294 of vol. 2):

> "The (Geneva) Convention contains detailed provisions concerning the information which the captor is entitled to ask from the prisoners. Such information is confined to a declaration of the prisoner's true names and rank, or his regimental number."

The immunity from giving testimony is, as stated above, expressly granted by Article 5 of the Geneva Convention on Prisoners of War—a treaty duly ratified by the United States, and as such, the supreme law of the land. As stated in Article VI of the Constitution, "all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land".[1]

POINT C

The immunity granted by the Geneva Convention has not been revoked.

The statute under which the defendant is charged cannot revoke the immunity of the treaty. At the outset, it is clear that statutes should not be interpreted as in conflict with treaties unless there is no other reasonable

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[1] Accord: *Maiorano* v. *Baltimore and Ohio RR Co.*, 213 U. S. 268, 272-273 (1909), 5 Hackworth, Digest of International Law (1942) 174-177.

interpretation but that the two are incompatible.[2] If this rule is applied, alien enemies and prisoners of war must be held to be an implied exception from the scope of the statute.

But if it is felt that there is a clear conflict between the statute and the treaty, the treaty must prevail, as later in time. "Where a treaty and an act of Congress are wholly inconsistent with each other and the two cannot be reconciled, the courts have held that the one later in point of time must prevail".[3] "The latest expression controls, whether it be treaty or an act of Congress".[4]

The statute under which this charge is laid was enacted on 24 January 1857 (c. 19, § 1, 11 Stat. 155). The treaty was ratified some 75 years later, on 16 January 1932 (47 Stat. 2021). The treaty therefore controls.

It may be contended that the amendment to the statute (adding a reference to joint committees) in 1938 (52 Stat. 942), was a re-enactment of the statute which therefore repealed the treaty. This is not its effect. In a similar case, a statute pre-dated a treaty, and was re-enacted, in identical words, after the treaty was ratified. It was urged that, because of the re-enactment, the statute was later in time and should prevail. The Supreme Court rejected this view, and said, per Brandeis, J.:

> "The Treaty was not abrogated by re-enacting § 581 in the Tariff Act of 1930 in the identical terms of the Act of 1922. A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed • • • Here, the contrary ap-

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[2] *Johnson* v. *Browne*, 205 U. S. 309, 321 (1907).

[3] 5 Hackworth, Digest of International Law (1942) 186.

[4] *United States* v. *Thompson*, 258 Fed. 257, 268 (1919).

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pears. The committee reports, and the debates upon the Act of 1930, like the re-enacted section itself, make no reference to the treaty of 1924. Any doubt as to the construction of the section should be deemed resolved by the consistent departmental practice existing before its re-enactment."[5]

But even more conclusive than the above authority, which is itself sufficiently determinative, are the rulings of the Supreme Court that the statute must be construed so as not to punish more than the Congressional committee can lawfully require. Thus it does not punish refusal to give testimony on a subject-matter not within the inquiry powers of Congress, although it contains no express reservation to that effect.[6] Certainly the committee of a single House of Congress cannot assume authority in derogation of a solemnly ratified treaty or even (without the most express language to that effect) in contradiction of accepted principles of international law.

The protection of the Geneva Convention re Prisoners of War extends to the defendant. While under arrest as an alien enemy, he was not under a duty to testify before the House Un-American Activities Committee, and therefore did not violate the statute under which he has been indicted.

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[5] *Cook* v. *United States*, 288 U. S. 102, 119-120 (1933).

[6] *In re Chapman*, 166 U. S. 661 (1897); *cf. Sinclair* v. *United States*, 279 U. S. 263 (1929); *Townsend* v. *United States*, 68 App. D. C. 223, 95 Fed. (2d) 352, cert. denied 303 U. S. 664; *Henry* v. *Henkel*, 207 Fed. 805 (S. D. N. Y. 1913); and see *Jurney* v. *MacCracken*, 294 U. S. 125, 151 (1935), citing *In re Chapman* with approval.

CONCLUSION

The conviction of the defendant-petitioner should be reversed and the charge against him dismissed.

Respectfully submitted,

LEE EPSTEIN,
Counsel for American Committee
for Protection of Foreign Born,
as *Amicus Curiae.*

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United States Supreme Court

OCTOBER TERM, 1948

GERHARD EISLER,
Petitioner,
against
UNITED STATES OF AMERICA.
No. 255

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

ARTHUR GARFIELD HAYS,
Counsel.

OSMOND K. FRAENKEL,
EMANUEL GORDON,
of the New York Bar,
of Counsel.

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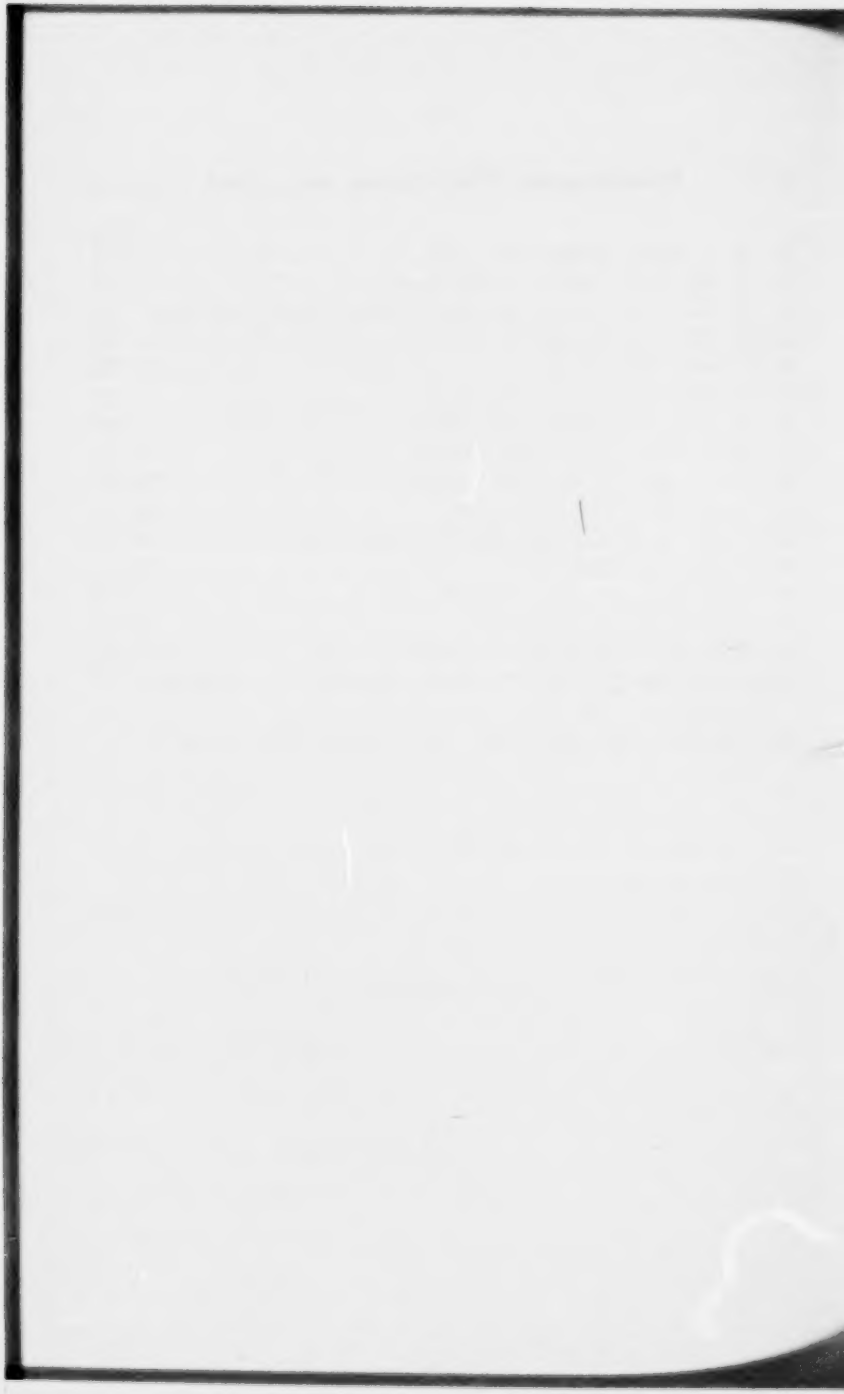

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United States Supreme Court

OCTOBER TERM, 1948

GERHARD EISLER, *Petitioner,*
against
UNITED STATES OF AMERICA.
No. 255

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*

The Interest of the American Civil Liberties Union

The American Civil Liberties Union is an organization devoted to the protection and expansion of the guarantees contained in the Bill of Rights. Because this proceeding involves a member of the Communist Party, we believe that it is pertinent to state our views regarding the Communist Party. The American Civil Liberties Union as a champion of civil liberties is opposed to any governmental or economic system which denies fundamental civil liberties and human rights. It is therefore opposed to any form of the police state or to any single party state and any movement in support of them, whether fascist, Communist, or known by any other name. In opposing these dictatorial or totalitarian systems, the Union takes

no position on their economic, social, or political practices or policies not affecting civil liberties.

From the inception of the House Committee on Un-American Activities, the American Civil Liberties Union has consistently opposed it both because its very existence in our view constitutes a threat to freedom of expression and association by the nature of its mandate, and also because its procedure has been so arbitrary and guided largely by personal whim and political prejudice.

We take the opportunity to file this brief because the case at bar presents for the first time for decision the issue of whether the exercise of the powers said to have been conferred upon the Committee is consistent with the Constitution. This is the only question with which this brief is concerned.

Statement

Petitioner was indicted for violating 2 U.S.C. §192 (1946) in that, having been summoned to testify before the Committee on Un-American Activities of the House of Representatives (hereinafter called the "Committee") created pursuant to Public Law 601, §121, 79th Congress, and House Resolution 5 of the House of Representatives, 80th Congress, upon matters of inquiry committed to said Committee, he wilfully defaulted in that he refused to be sworn when so directed (R. 214-215). Petitioner was found guilty, and sentenced to imprisonment for one year and fined one thousand dollars (R. 229). The Court of Appeals for the District of Columbia sustained the conviction (R. 233), Judge Prettyman, dissenting (R. 241). A petition for a writ of certiorari was granted November 8, 1948 (R. 253).

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The Facts

Petitioner, a political refugee, came to this country in June, 1941 as an alien in transit to Mexico (R. 95, 114). He offered to prove that he was admitted to the United States on August 6, 1941 (R. 114), that he never applied for, nor received, a change in status (R. 95). Petitioner made repeated efforts to leave this country (R. 116), and offered to prove that his numerous applications were denied (R. 97). He was a national of Austria, and had never registered as an enemy alien (R. 87, 117).

A process server for the Committee telephoned petitioner at his home on January 24, 1947 and informed him that he had a subpoena to serve on petitioner for the Committee requiring petitioner's presence on February 6, 1947; petitioner arranged to await the process server at his home and to accept service (R. 24, 120). Thereafter, petitioner arranged for his appearance before the Committee by preparing a written statement to be read after he was sworn (R. 111, 122, 131, 139), consulting counsel (R. 122), purchasing railroad tickets to Washington (R. 111, 122), and reserved hotel rooms in Washington (R. 122).

Thereafter, petitioner was arrested on a presidential warrant as an enemy alien by two Security Officers under Presidential Proclamation 2526, dated December 8, 1941 as "dangerous to public peace and safety of the public peace" (R. 82, 89, 91, 123).

It is petitioner's claim that his arrest was solely to effectuate his appearance before the Committee (R. 89, 100, 213).

At the hearing petitioner offered to prove that the Committee brought him before it to harass and punish him for

his political beliefs and not to interrogate him upon any matter relevant to the inquiry committed to the Committee by Congress (R. 101-102, 119, 134, 135). The proffer was rejected. He also offered to prove that the Committee practice was to permit counsel to confer with his client but not to permit the attorney to speak (R. 107).

When called upon to be sworn, petitioner stated that he desired to make a three minute statement before taking the oath (R. 43-45). The transcript of the record before the Committee reveals that petitioner said at first "I am not going to take the stand" (R. 43). However he claimed that he was interrupted and intended to complete the statement by adding "before I make a few remarks" (R. 129). Although the claim of interruption was disputed by the Committee's investigator (R. 151), the latter failed to indicate how he could determine whether petitioner had completed his answer. At any rate, within the succeeding few seconds, petitioner stated no less than five times that he would take the oath upon making his three minute statement (R. 43-47).

Petitioner offered to prove that he was advised by counsel to make his objections to being sworn before he took the oath (R. 149-150). The Chairman of the Committee testified that this was the proper procedure (R. 49). Petitioner had made some notes on his alleged illegal arrest and the improper action of the Committee (R. 112, 127). He had these notes in his hand and intended to use them to object to the legality of his being sworn (R. 137-138). Petitioner offered to prove that his objections to the legality of his being sworn were based upon his unlawful arrest, detention and transportation to Washington for a purpose not within the scope of the inquiry which the Committee was authorized to conduct, that he had

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insufficient opportunity to consult counsel and desired an adjournment to do so, and that the Committee had subpoenaed petitioner to harass and punish him for his political beliefs and to prevent his departure from this country (R. 73, 134-135).

The Chairman of the Committee did not know what petitioner was going to state in his three minute statement and did not inquire (R. 50). Petitioner intended only to state his objections to being sworn (R. 133), and offered to prove the content of his objections for the purpose of proving his intent to be sworn and to testify after stating his objections (R. 72, 133, 135).

The Issue

The sole issue with which this brief is concerned is the constitutionality of the mandate of the House Committee on Un-American Activities. It is our contention that the broad powers given to the Committee to inquire into opinions, beliefs, and associations are precisely those the framers of the Constitution intended to prohibit by the First Amendment. Furthermore, the terms of reference are so vague and meaningless as to require condemnation on those general principles which have heretofore compelled the courts to strike down dragnet statutes.

POINT I

The First Amendment prohibits Congress from compelling revelation of opinions whose expression it may not restrain.

Before reaching the discussion of the attack upon the mandate of the Committee on its face, we wish to note that we are not raising the question of the standing of the petitioner to raise this issue, nor whether the petitioner was called to punish and harass him for his political beliefs. It is our view that the existence of the power to inquire into opinions gives standing to challenge the Committee by anyone called before it.

A. Freedom to be silent.

The freedom of speech protected by the First Amendment is more than an abstract right to speak how and when the spirit moves. It is a function of the philosophy which knows no absolute standard for what is right and wrong, and which relies in the search for wisdom upon the ability of an idea to obtain acceptance after competition with others in the marketplace of public opinion. (Holmes, J., dissenting in *Abrams* v. *United States*, 250 U. S. 616, 630-631 (1919)). The First Amendment therefore establishes procedural rules consistent with this philosophy for the moulding of public opinion and of legislation itself. Those rules protect expressions of opinion on matters of public concern from governmental interference in the absence of an immediate likelihood that these expressions will themselves produce serious substantive evils.

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The compulsory enunciation of orthodox views is proscribed as a complete negation of free speech, which is a mechanism for obtaining the expression and comparison of conflicting opinions. *West Virginia State Bd. of Education* v. *Barnette*, 319 U. S. 624 (1943). Not only previous censorship, but subsequent punishment is prohibited, where the speech in question relates to matters of public concern, for punishment and the threat of punishment operate to restrain the free expression of views. By the same principles, the revelation under governmental compulsion of opinions and ideas concerning public policies violates the First Amendment.

Much wisdom has emanated from brave leaders, but the world's wisdom and the nation's progress owe something to the timid too. Where public matters are in issue, the transitory majority provides no insurance of ultimate truth, and final acceptance has often been achieved by ideas hesitantly advanced, initially ridiculed or even brutally suppressed. The world of ideas would be impoverished indeed if dissenters could not limit their voices to their immediate circle of friends, their own organization or whatever group they select for audience; if the unpopular could be required to account publicly for their private views, or to express themselves before a wider and hostile audience. For these reasons, forced confession burdens and restrains freedom of expression, and the free circulation of ideas.

The rights protected by the First Amendment run against the Federal Government and all of its organs. A Committee of the Congress is a governmental body, its action is that of the government, and its activity is subject to the limitations of the First Amendment as is that of any other Federal body. Cf. *West Virginia State Board of Education* v. *Barnette, supra.*

B. The resolution establishing the Committee must be tested on its face.

There are no doubt certain limited areas within which the Federal Government may constitutionally restrain speech falling within the scope of the First Amendment. Congress may not, however, enact legislation which includes, but goes beyond, the constitutionally permissible restraints. And when Congress has done so, by statute, a party affected thereby may challenge the statute on its face, and is not required to demonstrate that Congress could not, by a statute more narrowly drawn, impose the same restraint complained of in the particular circumstances of his case. *Thornhill* v. *Alabama*, 310 U. S. 88, 97, 105 (1940); *Carlson* v. *California*, 310 U. S. 106, 111 (1940); *Schneider* v. *New Jersey*, 308 U. S. 147, 163-165 (1939); *Hague* v. *C.I.O.*, 307 U. S. 496, 516 (1939); *Lowell* v. *Griffin*, 303 U. S. 444, 450 (1938); *Herndon* v. *Lowry*, 301 U. S. 263 (1937); *Stromberg* v. *California*, 283 U. S. 359 (1931). The reasons of policy which operate to free persons complaining of the violation of their rights under the First Amendment from the procedural limitations of their own cases are as applicable to the Resolution constituting the Committee as in any of the cases in which the doctrine has been enunciated and applied.

The reasoning of the cases just cited derives from the fact that restrictive legislation, carrying criminal penalties, has a power to coerce compliance by its very presence on the books. Legislation purporting to restrict speech which cannot constitutionally be restrained may be an efficient muffler, though unconstitutional. It is a function of our natural desire to be let alone that not all of us are anxious or willing to be test cases. Unless statutes

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imposing excessive restraints are declared invalid irrespective of their application in particular cases, the legislature has little reason to limit restraining laws to constitutionally permissible perimeters.

Of course, testing a statute on its face merely means that its constitutionality must be determined by its possible applications and not necessarily its application to the facts of the case in which the constitutional issue is raised. The statute must still be interpreted, and it is the wording of the statute as interpreted by the Court which is tested on its face. *Chaplinsky* v. *New Hampshire,* 315 U. S. 568. In the case of a Federal statute, the United States Supreme Court not only makes the final determination as to constitutionality, but also as to interpretation. And the Court has strained to interpret Federal statutes so as to render them constitutional to the extent of disregarding statements on the floor of the Senate made by the Committee Chairman who was in charge of the bill and a co-author of it, *United States* v. *C.I.O.,* 68 S. Ct. 1349, although such extrinsic aids are deemed to constitute authoritative guides to Congressional intent when a constitutional issue is not involved. *Riggs* v. *Del Drago,* 317 U. S. 95; *American Chicle Co.* v. *United States,* 316 U. S. 450.

The authoritativeness of such extrinsic aids as statements by the Chairman of the Committee reporting a bill and by the person in charge of a bill on the floor rest upon the assumed reliance by members of Congress upon those statements in voting upon the bill. No doubt, a certain amount of fiction and convention enters into that assumption, but it appears to be a reasonable one, and one better calculated to arrive at the intent of the individual members of the legislature who voted for the bill

than the subjective predilections of the judges interpreting it without such an aid. When a constitutional issue is raised, however, comity between the branches of government has led the Court to prefer the fiction that Congress intended the statute to be constitutional to the semi-fiction that the members of Congress relied upon the explanation of the Committee Chairman and floor leader.

But how far can this Court carry such fictions as the former in the interests of comity? In the instant case the House Resolution authorizing the inquiry did so in broad, undefined terms which permitted the Committee to roam at will in the field of social, religious and political beliefs, and the Committee did so. The Committee's abuses did not go unnoticed, but, on the contrary, were subjected to wide public debate, to scholarly inquiry and to many debates on the floor of Congress during the course of reenactment of the Resolutions. Yet, the resolutions were reenacted without change. That Congress actually approved the Committee's interpretation as evidenced by its conduct is not a fiction. It is the reality which arises from years of struggle, and it cannot be tossed aside as a fiction in favor of a more compelling fiction. The Resolution and its history will now be detailed briefly.

The Special Committee on Un-American Activities (hereinafter referred to as the "Committee") was established by House Resolution 282, 75th Cong., 83 Cong. Rec. 7568* for the purpose of conducting an investigation of

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* This Resolution has been re-enacted without change as H.R. 26, 76th Cong., 1st Sess., 84 Cong. Rec. 1098, 1128 (1939); H.R. 321, 76th Cong., 3rd Sess., 86 Cong. Rec. 572, 605 (1940); H.R. 90, 77th Cong., 1st Sess.; 87 Cong. Rec. 886, 899 (1941); H.R. 420, 77th Cong. 2nd Sess., 88 Cong. Rec. 2282, 2297 (1942); H.R. 65, 78th Cong. 1st Sess., 89 Cong. 1st Sess., 91 Cong. Rec. 10, 15 (1945). These are hereinafter referred to as the "Resolution".

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> "(1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution."

A refusal to answer any question or produce any paper relevant to the inquiry is rendered a criminal offense by the statute under which the petitioner was convicted. See *Kraus & Bros.* v. *United States*, 327 U. S. 614 (1946).

In the course of debate on re-enactment, the Committee's investigation was criticized as having been excessively broad, and attempts were made to limit the breadth of the resolution.* The re-enactments without change must therefore be deemed to constitute an approval of, and ratification by, the Congress of the Committee's interpretation of the permissible scope of its investigations. *Douglas* v. *Comm'r*, 322 U. S. 275 (1944). The Committee's work has already been subject to scholarly scrutiny, and it suffices to quote from one of these studies to obtain light on the scope of the investigation authorized:

> "The work of the Committee, in its nine years of existence, offers very little indication that the Committee itself had any clear idea about the scope of its authority. Its reports have commented on the meaning of 'Americanism', but the meanings suggested have varied greatly, and they were never put forth as standards controlling its inquiries. The

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* 83 Cong. Rec. 7567-7686 (1938); 84 Cong. Rec. 1098-1128 (1939); 86 Cong. Rec. 572-605 (1940); 87 Cong. Rec. 886-900 (1941); 88 Cong. Rec. 2282-2297 (1942); 89 Cong. Rec. 721-730, 795-810 (1943); 91 Cong. Rec. 10-14 (1945); 92 Cong. Rec. 7720-7728 (1946).

first emphasis was on 'Americanism' as the recognition of 'the existence of a God and the all-important fact that the rights of man are derived from God * * *.' The next report concentrated on groups which 'seek to change the policies and form of Government of the United States in accordance with the wishes of * * * foreign governments.' (Note, 47 Columbia Law Rev. 418).

"A later report said that the Committee's endeavor was 'to determine whether the persons under investigation have the interest of the United States Government at heart * * *.' Other criteria which the Committee or its agents have from time to time suggested as indicative of activity within the scope of its inquiries are: opposition to 'the American system of checks and balances,' opposition to the protection of property rights, belief in dictatorship, opposition to the Franco government of Spain, opposition to General MacArthur, advocacy of a world state, advocacy of the dissolution of the British Empire, criticism of members of Congress, and criticism of the Committee on Un-American Activities." (Id. pp. 422, 423).

Thus the Congress has authorized the Committee to require the disclosure on pain of criminal punishment, of opinions on such diverse matters as the existence of God, protection of property rights, the Franco government of Spain, General MacArthur, the British Empire, and of members of Congress. Free expression and exchange of ideas with respect to all of them is guaranteed by the First Amendment.

As we have said, compulsory revelation of opinion before the Committee, particularly where the opinions are unpopular, burdens the free expression of such opinions, and statutes restricting constitutionally protected speech, though invalid, exercise coercive powers by their appear-

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ance of authority. To the extent that the Resolution purports to authorize a compulsory revelation of political opinion having no relation to clear and present danger of substantive evils such as would warrant restrictions on their expression, it restrains and burdens the expression of such opinions outside the Committee room in violation of the First Amendment. Moreover, since the Resolution does not define the investigation in terms of expressed powers of Congress, and since the witness may refuse to answer if the matter is not pertinent to an inquiry Congress may lawfully authorize in aid of one or another of its legislative powers, *Kilbourn* v. *Thompson*, 103 U. S. 168, the witness is put to the task of determining, whether the evidence demanded is pertinent to any possible exercise of Congressional power. The witness is thus required to assume the burden of mental review of all of those powers, and to assume the risk of contempt, if the evidence demanded is, in one sense or other, pertinent to any one of them. Because this is so, the witness, rather than risk prosecution may disclose information which the Committee has no right to exact. Since such compulsory disclosure is threatened by the Resolution itself, the Resolution in this way, too, operates to burden speech. For as we have said, the dissenter who may be called to account before a hostile audience may prefer silence altogether. A nation which relies in its search for truth upon the free circulation of ideas cannot afford to put the price of dissent so high.

POINT II

The First Amendment is violated because the resolution provides improper standards.

A. The terms of reference are too vague.

At the outset the terms of reference under which the Committee has been directed to operate are so vague as to authorize any action which prejudice may inspire. What is "Un-American" and "subversive" is so debatable that no fixed meaning can be ascribed to those words. We do not think we need to quote the multitude of articles appearing in many magazines and law journals which give color to our views. Certainly from the variety of investigations undertaken by the Committee as noted on page , *supra,* it is quite clear that Congress itself could fix no area for such variable terms.

We also call the Court's attention to a recent article which points up the dangers inherent in governmental activity in the field of opinion and association where the terms of reference are vague and indefinite. Emerson and Helfeld, "Loyalty Among Government Employees", 58 Yale Law Journal, 1.

B. The mandate authorizes investigations on matters beyond the powers of Congress to investigate.

The resolution of the very basic problem posed by this case will depend on an accommodation of conflicting societal interests, both very real and very pressing. We assert, on the one hand, "the right to be let alone—the most comprehensive of rights and the right most valued by civilized

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men." (Brandeis, J. dissenting, *Olmstead* v. *United States*, 277 U. S. 438, 478). The Government will assert the importance of the right of Congress freely to ascertain any and all facts relevant to its legislative function. Both sides may concede the importance of the right asserted by the other, but both will deny it countervailing weight. We have asserted that if there is conflict between the two, the rights of the individual must prevail within the area of opinion. Beyond this, we believe that a determination in this case that the Constitution does not permit petitioner's conviction to stand will safeguard the constitutional rights of individuals without impairing in any significant respect the legitimate power of Congress to educate itself to the nation's needs.

We may assume arguendo that the right of silence differs in some degree from the right to speak as guaranteed by the First Amendment, and that the restraint imposed on speech by compelling speech may be justified as an incident of the inquisitional power when the information sought is desired in connection with a legitimate Congressional inquiry. But if this Court should so hold, it could do so only after striking a balance of competing considerations—the legislature's need for information on the one side, and the interest in having speech free from restraint, direct, or indirect, on the other. We submit that in making that judgment in this case, the failure of the Resolution to limit the scope of the inquiry to such matters as might be relevant to Congress' power to legislate requires the balance to be struck in favor of freedom, and not in favor of authority. We maintain, in other words, that if the justification for burdening speech is to be found in Congress' power to inquire in aid of legislation, then that justification

fails where not even minimum precautions have been taken to insure that the inquiry is indeed conducted for that purpose.

The Resolution carves out an area of human activity—and specifically the area of speaking, writing, and public assembly on political issues—and launches a general investigation in that area. The area is one in which Congress' competence to legislate is highly limited, and in which the opportunities and temptations for inquisitorial abuses are many (as the Committee's history shows). The Resolution does not direct the investigators to assemble such facts as might be relevant to some or any legislative power. It does not direct the Committee to determine whether there exists a political movement for violent overthrow of the Government, or whether the morale in the armed forces is being undermined. On the contrary, the Resolution, in terms and effect, authorizes an investigation into a large segment of American life without any attempt to limit the investigators to paths of inquiry consistent with the limited powers of Congress in the area under scrutiny.

It will be said that we must presume that the House authorized the inquiry for the purpose of collecting information it desired in aid of its legislative function. We may assume this to have been the purpose without conceding that the Resolution as drafted limits the Committee to the effectuation of that purpose. Need we presume also that the Committee, in execution of its authority under the Resolution, limits its investigation to the discovery of such information as might be helpful in legislation? We think not, not merely because that would be contrary to fact, but rather because the Resolution directs the Committee to undertake a general investigation without imposing any such limitation.

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It may be argued that Resolution is not too broad, and that the House could have determined that any and all information within the scope of the investigation authorized would or might be relevant to some one of its powers to legislate. We have already indicated that we do not believe this to be so, but making allowance for possible error, we will concede this point too for the moment. But in that view, hardly any aspect of life within the United States, however private, would be without some bearing, however slight, on some power of Congress. It may well be, therefore, that there is nothing so sacred or so private as to be beyond Congress' power to inquire. The difficulty here would then lie not in any lack of relevance in the subject-matter of the inquiry to some possible exercise of legislative power, but in the failure to provide standards which would provide some measure of insurance that the inquiry into that subject matter is being conducted for a legitimate purpose.

No Congressional investigation can or will ever discover and catalogue all of the minutiae of American life. Congressional investigations are, or should be, the work of practical men, seeking solution to practical problems, not adventures in curiosity into the merely interesting or remotely relevant. Investigation is necessarily a selective process, and selection necessarily implies criteria. The general course which the investigators will take, even the specific questions they address to witnesses, will be determined in large part by the standards of selection provided. If those standards are not rooted in some more or less specific power to legislate, especially where that power is highly limited in the area of the investigation, and that area is as broad as in this case, the investigators must needs proceed along the lines indicated by their commissions, without reference to the deficiencies of power. And

that, we may remark, is precisely what this Committee has done.

We have already stated that the Committee, in requiring witnesses to profess their political affiliations and beliefs, burdens the free expression of political ideas. If the First Amendment permits this when the burden is a practical concomitant of the legislative process, we do not believe that it does so when no such relationship exists. And, we submit, inasmuch as the Resolution does not direct the investigation to proceed in terms of the limited competence of Congress in the area of investigation, no constitutional justification exists for the burden imposed on the rights of free speech, press and public assembly.

POINT III

Section 192, as applied, violates the Fifth Amendment.

The statute petitioners were convicted of violating makes it a crime to refuse to produce evidence before a Congressional Committee "upon any matter pertinent to the inquiry." The matter under inquiry before the Committee was defined only by the Resolution. We submit that the vagueness of the language used in the Resolution to define the scope of the inquiry make it next to impossible for the witness to determine whether matter demanded is or is not pertinent to the inquiry. To the extent that Section 192 incorporates the terms of the Resolution, as it must, it provides no reasonably ascertainable standard of guilt, and conviction thereunder constitutes a violation of the due process clause of the Fifth Amendment. *Musser* v. *Utah*, 333 U. S. 95; *Winters* v. *New York*, 333 U. S. 507.

In addition to the problem of determining whether particular matter is pertinent to the inquiry as defined by the

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Resolution, the witness, from the Government's point of view, has the additional task, already remarked upon, of determining whether the matter demanded is pertinent to *any* inquiry Congress might constitutionally authorize. The witness may lawfully refuse to answer if the matter is not pertinent to an inquiry Congress may lawfully authorize in aid of one or another of its legislative powers, *Kilbourn* v. *Thompson*, 103 U. S. 168. In making his decision to answer or to refuse to do so from this viewpoint, the witness finds no help in the Resolution, which refers him to no specific power in Congress as the basis for the investigation. Evidence within the scope of the investigation as defined by the Resolution may or may not be pertinent as regards any or all of those powers, but the witness is made liable to fine and imprisonment if his mental search fails to detect the pertinency of the matter demanded of him to one of any number of undisclosed powers of Congress. In this respect too, Section 192, as applied, does not provide standards of guilt sufficient to satisfy due process.

CONCLUSION

We respectfully urge that this Court declare unconstitutional the mandate of the House Un-American Activities Committee.

Respectfully submitted,

American Civil Liberties Union,
Amicus Curiae.

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NOVEMBER 21, 1949.

Per Curiam Decisions.

No. 255, October Term, 1948. EISLER *v.* UNITED STATES. Certiorari, 335 U. S. 857, to the United States Court of Appeals for the District of Columbia Circuit. *Per Curiam:* The motion to dismiss is granted and the writ of certiorari is dismissed. MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Solicitor General Perlman* was on the motion to dismiss for the United States. *David Rein* and *Joseph Forer* were on a memorandum opposing the motion for petitioner. Reported below: 83 U. S. App. D. C. 315, 170 F. 2d 273.